Supreme Court, U.S.
FILED
991181 JAN 18 2000
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

ALBERT ZUCKER, SARAH MANDELBAUM, WEISS & YOURMAN and STULL, STULL & BRODY,

Petitioners,

vs.

OCCIDENTAL PETROLEUM CORP., RAY IRANI, HOWARD COLLINS, WALTER KAUFMANN and LAWRENCE W. SCHONBRUN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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178 pp

QUESTIONS FOR REVIEW

The questions presented for review turn upon an inter-Circuit and intra-Circuit split in authority concerning the proper application of the standing requirements embodied within Article III, Section 2 of the United States Constitution, and enunciated in recent United States Supreme Court decisions, to wit:

1) whether, on initial appeal, the Ninth Circuit exercised impermissible hypothetical jurisdiction over an appeal when an objector to a class action settlement order failed to establish his own Article III standing to appeal the actions of the lower court;

2) whether the District Court committed reversible error when, upon subsequent remand from the Ninth Circuit, it refused to make an independent Article III determination of standing and summarily ruled that the same individual objector – who had suffered no direct or indirect injury and had no remaining substantive stake in the outcome of his appeal – had the right to further challenge a class action settlement agreement; and

3) if said objector lost requisite standing during the pendency of an earlier appellate process, whether all or some of the judicial orders resulting from the interference of this non-party should be vacated as being in excess of the federal jurisdictional standards.

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OPINION AND ORDERS BELOW

On or about November 1, 1993, the United States District Court For the Central District of California approved a Final Judgment and Order of Dismissal in that case entitled *Zucker v. Occidental Petroleum Corp.* (Case No. CV 91-0214 JMI(RCx) (Ideman, J). App. at 15-19. That Order was appealed by Walter Kaufmann as an Objector and reviewed by the Ninth Circuit Court of Appeals, which issued a decision on October 6, 1995. *Zucker,* 1995 U.S. App. Lexis 29728. App. at 129-134. On remand, the trial court issued a revised Order on or about June 5, 1997, which reduced the award of attorney fees contained in the initial Final Judgement and Order by approximately sixty-six percent. *Zucker,* 968 F. Supp. 1396 (C.D. Cal. 1997). App. at 78-89.[1] Plaintiffs and class counsel in the underlying action appealed this revised Order and the United States Court of Appeals For The Ninth Circuit affirmed the District Court's revised Order on October 19, 1999. *Zucker,* 192 F.3d 1323 (9th Cir. 1999). App. at 1-14.

JURISDICTION

The District Court's jurisdiction over this matter was based on the presence of federal questions, as Petitioners' original complaint alleged claims under the federal securities laws. App. at 2-4. Initial jurisdiction by the United States Court of Appeals for the Ninth Circuit of the issues

[1] This Order was amended on August 4, 1997. App. at 118-121, 122-128.

contained therein was based upon 28 U.S.C. § 1291. Jurisdiction is appropriate for the instant Writ of Certiorari pursuant to 28 U.S.C. § 1254(1), which specifically allows for review upon granting of a writ of certiorari upon petition by any party to any civil or criminal case, before or after rendition of judgment or decree. *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264 (1979).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution mandates that an injured party allege an actual "case or controversy" and, by implication, standing of the parties in order to properly invoke the judicial authority of the federal courts. It provides as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, or other public Ministers and Consuls; – and to Cases of admiralty and maritime Jurisdiction; – Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between citizens of different States; – between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all cases affecting Ambassadors; other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all other Cases

before mentioned, the Supreme Court shall have appellate Jurisdiction both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as Congress may by Law have directed.

STATEMENT OF THE CASE

As is indicated in the Ninth Circuit's second opinion in this case, *Zucker v. Occidental Petroleum Corp.*, 192 F.2d 1323 (9th Cir. 1999), Albert Zucker and Sarah Mandelbaum, through their attorneys of record, Weiss & Yourman and Stull, Stull & Brody ("Petitioners"), filed a class action for securities fraud against defendants Occidental Petroleum Corp. ("Oxy"), Ray Irani and Howard Collins ("Defendants"). The gravamen of this action was the allegation that Defendants made material misrepresentations of fact when they represented to the public that Oxy would maintain its $2.50 per share annual dividend payments to shareholders. Traditionally, Oxy made annual dividend payments of $2.50 per share regardless of company earnings; even when earnings could not sustain such a dividend, assets were sold off to accommodate the payments. However, on January 14, 1991, Oxy announced a new policy by which dividend payouts would reflect fifty percent of earnings – a method which stood to

substantially destabilize and radically decrease shareholder dividends. Three separate class actions were thereafter filed against the Defendants. Each of these pleadings asserted that the shareholders had relied on Defendants' false and misleading misrepresentations to their detriment in that the market price that they paid for the Oxy securities had been fraudulently inflated by a failure to promptly and adequately advise the public as to the material shift in corporate strategy. App. at 2-3.

After almost three years of litigation, on November 1, 1993, the parties entered into a settlement agreement which resolved the consolidated litigation. Pursuant to this accord, Oxy guaranteed a minimum $1 per share annual dividend up to 1997. Oxy also promised to make a fifty percent payout of sustained earnings if that amount exceeded $2 per share. If the sustained earnings from 1993-95 amounted to less than $2 per share, the payout rate would be sixty (60) percent in 1996 and 1997. All of these terms were subject to the Board's fiduciary obligations, business judgment and its ability to enter into contracts and contractual agreements in any financing. App. at 3-4. The Settlement also provided for the payment of fees and expenses to plaintiffs' counsel. App. at 3-4.

On February 24, 1993, Walter Kaufmann ("Objector"), a putative member of the class covered by the litigation, filed an objection to the proposed Settlement and proposed attorneys' fees through his attorney of record, Lawrence Schonbrun. Over this objection, the District Court approved the Settlement and awarded attorneys' fees in the amount of $2,975,000. App. at 4, 15-19. Kaufmann appealed the denial of his objection as well as

his counsel's right to engage in oral argument pertaining to the fairness of the Settlement. In response, the Ninth Circuit Court of Appeals issued a ruling in October of 1995, holding that *"[n]othing in the record indicates that oral argument would have added to the district court's understanding of the issues before it or altered the outcome. The district court did not abuse its discretion in not permitting oral argument."* App. at 132-133 (emphasis added). Nevertheless, without making any specific or explicit findings concerning Kaufmann's standing, the Ninth Circuit remanded the case for further consideration because the trial court had failed to make any findings sufficient to support the award of attorneys' fees – an issue which was not even before either court. App. at 133-134.

After remand was completed, the depositions of Kaufmann and Schonbrun were taken on February 19, 1997 and February 25, 1997, respectively. During these discovery proceedings, Petitioners first learned facts which established that although Kaufmann may have at one point been a member of the subject class, he had voluntarily sold his stock in Oxy and therefore did not have the requisite standing to pursue his objection. As per Mr. Kaufmann's own testimony, the Objector believed he had sold *all* of his shares during or at least prior to 1995. App. at 135-138. Indeed, it became painfully clear that absent ownership interest in the stock at issue, Kaufmann lacked any recognizable form of economic or non-economic interest in the settlement.[2] Moreover, he

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[2] Not only did the Objector allege the presence of any personalized actual or potential injury, he tacitly admitted that he had no stake in the outcome and was merely objecting on

admitted that he expected to obtain no benefit from the results of his objections. App. at 140.

As one might expect, upon discovering the above-referenced set of circumstances, Petitioners argued that Mr. Kaufmann's actions had rendered his appeal of the lower court's order improper and, hence, the opinion rendered in the first Ninth Circuit decision nugatory due to mootness.[3] App. at 38-32, 69-77. Notwithstanding Kaufmann's admissions, the District Court deliberately side-stepped the fundamental issue of the existence of standing via a "case and controversy". Specifically, the District Court held that: "[The standing] issue . . . appears to have been already decided by the Ninth Circuit. While not expressly addressing this issue on appeal, the Court of Appeals heard Objector's arguments and ruled in part in his favor. Therefore, the Ninth Circuit implicitly recognized Objector's standing to challenge Class Counsel's request for attorney's fees." App. at 80. On this basis, undeterred by mere facts or evidence pertinent to the obligations imposed under Article III, the District Court reviewed the pertinent papers and oral argument of the

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grounds of "principle". Even if he once had standing, his ability to move forward was lost when he voluntarily sold his stock. App. at 138-140, 141-143.

[3] The U.S. Supreme Court has described mootness as " 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).' " *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S. Ct. 1202 (1980) (quoting Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L. J. 1363, 1384 (1973)).

Objector before summarily reducing the award of attorneys fees to $1,151,527.80 and awarding the putative Objector almost $48,744.62 in attorney fees. App. at 80-89.

On June 16, 1997, Petitioners submitted Plaintiffs' Notice of Motion for Reconsideration of the Court's June 5, 1997 Order and once again pointed out that Kaufmann lacked the requisite standing to interject himself into the litigation. Petitioners also referred the District Court to new case law which further demonstrated that the District Court was precluded from entertaining the objections of Kaufmann because he lacked standing. App. at 92-97, 104-108. Despite the strength of these arguments and the supporting evidence, the District Court denied Appellants' motion for reconsideration. App. at 118-121.

Petitioners appealed the above-referenced ruling of the District Court. However, in a partisan, result-oriented opinion filed on October 19, 1999, the United States Court of Appeals for the Ninth Circuit (Kleinfeld, J.) upheld the lower court's actions. App. at 1-14. This decision was based on three separate theories. First, after admitting that the issue of standing was "difficult", the Court cited certain cryptic principles of agency law and general public policy considerations before finding that Kaufmann's standing as a class member created a "fiduciary responsibility" between Kaufmann and class counsel which in and of itself might be sufficient to warrant his participation even if, on a personal level, he had no real contemporaneous stake in the litigation. App. at 6-10.[4] Second, despite the stark reality that Kaufmann failed to allege or

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[4] *See* Footnote No. 7, herein.

prove the existence of any economic or non-economic injury or any recognizable personal benefit to be derived from contesting the prior award of attorney fees, the Court ruled that Article III "case or controversy" issues – and, hence, standing requirements – were simply irrelevant because the issue of attorney fees was merely "an ancillary matter". App at 13. Finally, blatantly ignoring the fact that Ninth Circuit's initial ruling of October of 1995 and all subsequent rulings from the District Court were essentially "fruit of the poisonous tree" and would not have existed but-for the initial mooted appeal of the Objector, the Ninth Circuit employed a curious form of circular reasoning and came to the conclusion that *regardless* of the Objector's standing, the District Court's duty to "decide upon an award and articulate its reasoning" vitiated Article III concerns of mootness and, by implication, any requirements relative to the standing of the parties. App. at 13-14.[5]

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[5] In ruling in this matter, the Court of Appeals conveniently ignored the issue of whether there had been any actual ruling on the standing issue in the Ninth Circuit's prior October of 1995 decision or whether the evidence subsequently obtained during the depositions of the Objector and his Counsel was sufficient to over-ride the doctrine of "the law of the case". It is well-settled that the "law of the case" doctrine does not bind the United States Supreme Court in reviewing lower court decisions and a writ of certiorari can expose the entire case for review. *Christianson v. Colt Indust. Operating Corp.*, 486 U.S. 800, 817, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988). More to the point, the doctrine of the "law of the case" does not serve as an absolute bar to reconsideration of issues in which evidence on a subsequent trial may be *substantially different*, controlling authority has since made a contrary decision of law applicable

REASONS FOR GRANTING THE PETITION

I. The Supreme Court Should Grant A Writ of Certiorari When: 1) Lower Federal Courts Have Exercised "Hypothetical Jurisdiction" in Excess of Article III, Section 2 Standing Requirements And 2) There Are Conflicts Both Within A Circuit Between Federal Appellate Circuits Regarding The Constitutional Requirement of Standing As a Prerequisite To Appeal the Reasonableness of Class Action Settlements And/Or Awards of Attorney Fees

A. All Parties To An Action Must Have Standing To Sue In Federal Courts

Article III, Section 2 of the United States Constitution mandates that an injured party allege an actual "case or controversy" to invoke the judicial authority of the federal courts. Incorporated into the case or controversy requirement is the necessity that a party establish her standing to sue or defend in federal courts. Standing is a purely jurisdictional prerequisite, *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264 (1979), and a party invoking federal jurisdiction has the burden of establishing that

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to such issues, or the decision was clearly erroneous and would work a manifest injustice. *Hegler v. Borg*, 50 F.3d 1472, 1475 (9th Cir. 1995). Although neither the District Court nor the Ninth Circuit apparently wanted to consider mere facts or evidence pertinent to Article III standing issues before rushing off to issue rulings regarding the award of attorney fees, the Petitioners respectfully call this Court's attention to the deposition testimony of Kaufmann and Schonbrun – evidence which unequivocally establishes that Kaufmann had no concrete stake in the subject litigation at the time of the pendency of the first appeal in this action. App. at 135-143.

they have met this requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130 (1992).

In the case of *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S. Ct. 752 (1982), the United States Supreme Court clarified the criteria a party must meet to establish standing under Article III, Section 2. In *Valley Forge*, respondents, an organization dedicated to the separation of church and State and several of its employees, filed suit in district court, arguing that Congress's ability to dispose of surplus federal property under the Federal Property and Administrative Services Act of 1949 (the "Act") violated the Establishment Clause of the First Amendment and that each member of respondent organization "would be deprived of the fair and constitutional use of his (her) tax dollars." *Valley Forge*, 454 U.S. at 464. Pursuant to the terms of the Act, the Secretary of Health, Education and Welfare, who had the authority to declare as "surplus" and transfer to public or private entities federal property that had outlived its usefulness to the Government, declared property formerly used as a military hospital as "surplus property" and conveyed said property to petitioner, a church-related college. *Id.*

The district court dismissed respondents' complaint on the grounds that respondents lacked standing to sue as taxpayers and failed to allege any actual injury beyond a generalized grievance common to all taxpayers. *Id.* The Third Circuit Court of Appeals reversed the district

court's ruling[6] and held that although respondents did not have standing as taxpayers to challenge the conveyance, they did have standing as "citizens," claiming " 'injury in fact' to their shared individual right to a government that 'shall make no law respecting the establishment of religion.' " *Id.* According to the Third Circuit Court of Appeals, said standing was sufficient to satisfy the "case or controversy" requirements of Article III, section 2. *Id.*

The Supreme Court, however, reversed the Third Circuit Court of Appeals' decision and ruled that the respondents did not have standing to sue. In its decision, the Supreme Court held that at an irreducible minimum, Article III required the party who invokes the court's authority to show some *actual or threatened personal injury* as a result of the putatively illegal conduct of the defendant, and that the injury could fairly "be traced to the challenged action" and was "likely to be redressed by a favorable decision," *Valley Forge, supra,* at 472 (citing *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 99 (1979) and *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 38, 41 (1976)).

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[6] Whether or not a party has standing is a mixed question of fact and law. *United States v. Singleton,* 987 F.2d 1444, 1447 (9th Cir. 1993). A district court's ultimate legal conclusions regarding the issue of standing are reviewed *de novo. Id.* Factual determinations underlying a district court's decision on standing, however, are reviewed under the "clearly erroneous" standard. *American-Arab Anti-Discrimination Comm. v. Thornburgh,* 970 F.2d 501, 506 (9th Cir. 1991).

The Supreme Court further held that:

> The requirement of "actual injury redressable by the court," *Simon*, supra, at 39, serves several of the "implicit policies embodied in Article III," *Flast*, supra, at 96. It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. The "standing" requirement serves other purposes. Because it assures an actual factual setting in which the litigant asserts a claim of injury in fact, a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court.
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> *Valley Forge, supra,* at 472.

The Supreme Court also stated: "The federal courts have abjured appeals to their authority which would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of *concerned bystanders.*' *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973)." *Valley Forge, supra,* at 473 (emphasis added).

Turning its attention to the facts before it, the Supreme Court held that although respondents claimed that the transfer of property violated the Constitution, the Respondents failed "to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with

which one disagrees." *Valley Forge, supra,* at 485. The Supreme Court also pointed out that:

> [S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy. '[That] concrete adverseness which sharpens the presentation of issues,' *Baker v. Carr,* 369 U.S. at 204, is the anticipated consequence of proceedings commenced by one who has been *injured in fact;* it is not a permissible substitute for the showing of injury itself.
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> *Valley Forge, supra,* at 486 (emphasis added).

B. The Instant Ruling Is Both In Excess of Article III, Section 2 Standing Requirements And Has Created A Conflict Both Within the Ninth Circuit and Between the Ninth Circuit and Seventh Circuit Relative To The Standing Of Certain Objectors In Class Action Litigation

Prior to the rulings in the instant matter, the Ninth Circuit had diligently followed the principles and holding laid out in *Valley Forge* – especially when presented with the issue of whether a class member must have standing to object to or appeal a proposed settlement or the award of attorney fees. The best example of this trend is exemplified in the decision rendered in, *In re First Capital Holdings Corporation Financial Products Securities Litigation, supra,* 33 F.3d 29 (9th Cir. 1994). The *First Capital* case concerned a class action lawsuit filed against numerous defendants who were engaged in the business of issuing and/or selling annuities and life insurance policies. *First Capital,* 33 F.3d at 29. When the district court approved a settlement of the case which included

the payment of attorneys' fees to class counsel, a class member, once again represented by Lawrence Schonbrun, appealed the order approving the payment of attorneys' fees. *First Capital, supra,* at 29-30.

Relying heavily on *Valley Forge,* the Ninth Circuit ruled that the appellant class member lacked standing to object to the attorneys' fees. The Court stated that:

> The power of the federal courts to hear cases is always subject to the constraints set forth in Article III of the Constitution. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 173-75 (1803). Article III "requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 472 (1982).

Id.

More importantly, the Court added that:

> *Simply being a member of a class is not enough to establish standing. One must be an aggrieved class member.* This was made clear by the Marshal court's reliance upon *Ace Heating & Plumbing Co. v. Crane Co.,* 453 F.2d 30, 32-33 (3d Cir. 1971). In *Ace,* the Third Circuit recognized that "[o]rdinarily, aggrieved class members may appeal any final order of a district court in proceedings held pursuant to rule 23." . . . The word "aggrieved" is a necessary, not merely descriptive, term. It is necessary to make the

> statement compatible with Article III requirements and is a recognition that not all class members will be aggrieved by all decisions.

Id. (emphasis added).

Applying the legal authority of *Valley Forge* to the facts of the case then before it, the *First Capital* appellate tribunal drew a reasoned distinction between those who were merely technically class members and those who had actual substantive interests in the litigation. Since the plaintiff had been a member of the class solely by virtue of the fact that she had cashed in her annuity within the dates prescribed in the class notice, she asserted "no economic or non-economic injury . . . [and] . . . suffered no injury 'likely to be redressed by a favorable decision.' *Valley Forge*, 454 U.S. at 472." *Id.* Accordingly, because she could not demonstrate any such injury, the appeal of the "class members" was summarily dismissed. *Id.*[7] Under *First Capital*, while an Objector may technically be termed class member, Article III, requires that each Objector must establish that he was aggrieved (suffered an actual or

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[7] In the present case, the appellate court attempted to circumvent the unambiguous holding in *First Capital* by claiming that the earlier case merely dealt with instances in which a class member could no longer participate because may have been part of a sub-class of individuals who, although covered by the action, had sustained no injuries. Conversely, the appellate court characterized the present instance as one in which "economic injury" might result from the attorney fees. App. at 10-13. However, within the context of the instant litigation, this distinction is patently illusory in light of the uncontested fact that Kaufmann and his attorneys testified that the Objector no longer had any material stake in the litigation. App. at 92-97, 104-108, 135-143.

threatened injury) and that his injury is likely to be redressed by a favorable decision. Failure to establish this strict requirement acts as a bar against invoking appellate review and the failure to make this determination must amount to reversible error.

This well-reasoned of the restrained application of the hypothetical jurisdictional doctrine is supported by rulings in a number of other Circuits. The Seventh Circuit in the case of *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998), *cert. granted, Cal. Pub. Employees Ret. Sys. v. Felzen*, 524 U.S. 980 (1998) was confronted with a situation in which nonparty shareholders appealed a judgment of the United States District Court for the Central District of Illinois involving a derivative action. Overruling prior precedent within the Seventh Circuit, the *Felzen* Court specifically dismissed the appeal due to a lack of jurisdiction since the non-parties had, at best, an indirect injury and had not bothered to formally intervene in the underlying litigation. *Id.* at 875, 877-878. Citing language from the United States Supreme Court's decision in *Marino v. Ortiz*, 484, U.S. 301, 304, 108 S. Ct. 586, 587-88, 98 L.Ed.2d 629 (1988), the Seventh Circuit emphatically stated that "a person adversely affected by the settlement of a class action may appeal from the consent decree based on that settlement *only if he has intervened as a party.*" *Id.* at 874. Consistent with this view and directly against the present holding of the Ninth Circuit, a multiplicity of federal courts have ruled that controversies over attorney fees, in

and of themselves, *will not* be sufficient to confer standing when the underlying basis for an action is moot.[8]

The same Article III-based concern that individuals who seek to appeal rulings must have a direct and recognizable interest in underlying cases has been aptly demonstrated in this Court's own holding in the recently decided case of *Steel Company v. Citizens For A Better Environment*, 523 U.S. 83 (1998), a decision emanating from a private organization's efforts to enforce the citizen-suit provision under the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA). In *Steel Company*, an organization sued a small manufacturer for its failure to file timely toxic and hazardous chemical storage and emission reports for past years. *Id* at 86. Pursuant to terms of EPCRA, the organization was first required to mail a notice to the Administrator of the Environmental Protection Agency, other relevant state authorities and the manufacturer. *Id.* at 87. The organization fulfilled the notice requirement and mailed a letter which alleged that the manufacturer failed to complete and submit the requisite forms. *Id.* at 88.

Upon receiving the notice, the manufacturer quickly filed all the overdue forms with the relevant agencies. *Steel Company* at 88. Since the manufacturer filed all the requisite forms, the EPA decided not to file an action against the manufacturer. *Id.* Notwithstanding these later events, when the prescribed 60-day waiting period expired, the organization filed suit in Federal District

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[8] *See S-1 v. Spangler*, 832 F.2d 294, 297, n.1 (4th Cir. 1987); *Dahem v. Board of Education*, 901 F.2d 1508, 1511 (10th Cir. 1990); *Bagby v. Beal*, 606 F.2d 411, 414 (3d Cir. 1979).

Court. *Id.* Arguing that the organization's case was moot because the filings were updated, the manufacturer quickly moved to dismiss the case. *Id.* The trial court agreed with the manufacturer and ruled that it had no jurisdiction to entertain the suit for the present violation and, because EPCRA does not allow suit for purely historical violations, the organization's cause of action for filing late was not a claim upon which relief could be granted. *Id.* The Seventh Circuit Court of Appeals, however, reversed the district court decision and held that the organization could seek to enforce penalties against EPCRA violators who filed all the necessary forms after the statutory deadline and after receiving notice. *Id.*

In a unanimous decision, this Court vacated the Seventh Circuit judgment and remanded the case with a direction to dismiss the complaint. Holding that since none of the relief sought by the organization would remedy the alleged *injury in fact*, this Court found that the organization lacked standing to bring suit, *Steel Company, supra* at 109-110, noting that:

> "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. 506, 7 Wall. 506, 514, 19 L. Ed. 264 (1869). "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. *This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." Great*

> *Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. [449, 453 (1900)]. *The requirement that jurisdiction be established as a threshold matter "springs from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382, 28 L. Ed. 462, 4 S. Ct. 510 (1884).

Steel Company, supra at 94-95 (emphasis added).

The Supreme Court added:

> While [some cases] must be acknowledged to have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question, none of them even approaches approval of a doctrine of "hypothetical jurisdiction" that enables a court to resolve contested questions of law when its jurisdiction is in doubt. *Hypothetical jurisdiction produces nothing more than a hypothetical judgment – which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.*

Steel Company, supra at 101 (citations omitted) (emphasis added).

Given the above-referenced mandate emanating from this Court's recent rulings mandating that individuals seeking the "protection" of the federal court system have

actual cases in controversy,[9] there is now an unmistakable split in the controlling case authority. Whereas United States Supreme Court as well as the Third, Fourth, Seventh and Tenth Circuits and earlier tribunals within the Ninth Circuit have adhered to the principles of *Valley Forge* and *Steel Company* in demanding the presence of real "cases or controversies" involving the concrete interests of the individuals contesting each of the issues in the litigation process, the Ninth Circuit has now adopted a radical departure from these well-established Article III principles under the guise of a misplaced "public concern"[10] over the proprietary motivations of class counsel.[11] Unless this Court resolves the apparent contradiction, there is a high probability of further litigation wherein District Courts throughout the country may be compelled to entertain numerous hypothetical arguments

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[9] Also *see Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997), as further examined below.

[10] Generalized public concern over issues is simply not sufficient to confer federal jursidiction. *In Re Independent Counsel v. Mandanici*, 152 F.3d 741 (8th Cir. 1998) (dismissing "ethics grievance" against Whitewater prosecutor on grounds of conflict of interest).

[11] Any concerns about "conflicting interests" of class counsel are already remedied by mandatory trial court review of class action settlements under Federal Rule of Civil Procedure Rule 23. This procedure was followed in the instant case and resulted in approval of the settlement and the payment of class fees. App. at 4, 15-19. Indeed, the original Ninth Circuit opinion specifically found no substantive reason to dispute the District Court's prior actions. App. at 132-134.

by a self-appointed class of professional officious intermeddlers.[12]

C. Article III Standing Requirements Compel That Prior Orders Be Vacated on the Ground of Mootness

Under clearly established federal law, a case must remain an actual controversy at every stage of review to avoid becoming moot in the Federal judicial system. *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997). That is, "a plaintiff must maintain standing at all times throughout the litigation for a court to retain jurisdiction." *Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477, 1485 (10th Cir. 1995). Similarly, " 'a case becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S. Ct. 1944 (1969)).

Assuming, *arguendo*, that Kaufmann had standing at the time he filed his appeal, the facts cited above – especially the fact that he chose to sell all his Occidental stock during or prior to 1995 – establish that he freely opted to relinquish any actionable interest in the case. Kaufmann's standing to contest the award of attorney

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[12] This is especially true where, as here, there is no indication whatsoever that the earlier Final Judgment and Order of Dismissal was obtained through fraud and the Objector merely sought to intervene on the grounds of generalized "public policy" concerns. App. at 138-140.

fees was forfeited if not before the Ninth Circuit handed down its initial opinion in late 1995, then most certainly before the District Court allowed him to file a response to Plaintiffs' Memorandum Justifying Attorneys' Fees.[13] At either critical juncture, any case Kaufmann had against the Settlement or the award of attorneys' fees to class counsel became purely conjectural and moot. In point of fact, he was no longer a participant in a "live" case before the District Court.

The United States Supreme Court recently affirmed the necessity that federal courts hear only live "cases and controversies" under Article III, Section 2 of the U.S. Constitution and confronted the issue of how to dispose of moot actions. In *Arizonans for Official English*, an employee of the Arizona State Government filed a suit against the State of Arizona and Arizona State government officials that challenged an amendment to the Arizona Constitution which designated English as the official State language and required that the State conduct official business in English. *Arizonans for Official English*, 117 S. Ct. at 1055. The primary plaintiff left her job as a government employee after the district court enjoined the

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[13] If Objector Kaufmann sold his stock before the Ninth Circuit heard oral argument on July 19, 1995 or made its ruling on October 6, 1995, the appellate court lost its subject matter jurisdiction during the appeal. *See Dufresne v. Veneman*, 114 F.3d 952 (9th Cir. 1997). In any event, since the October 6, 1995 Memorandum issued by the Ninth Circuit emanated from Objector Kaufmann's action, which became moot when he lost his standing, as is argued below, the Memorandum should be vacated along with any other orders resulting from his objection.

law as overbroad; nevertheless, various appeals followed, with the Ninth Circuit affirming the injunctive relief granted by the lower court. On *certiorari*, the Supreme Court disposed of the matter on standing grounds, ordered the case dismissed and nullified the Ninth Circuit's prior actions.

In reversing the Ninth Circuit decision, the Supreme Court rebuked the tribunal within the Ninth Circuit and held that the Appellate Court "had no warrant to proceed as it did" because the "case had lost the essential elements of a justiciable controversy and should not have been retained for adjudication on the merits by the Court of Appeals."[14] *Arizonans for Official English, supra,* at 1060. Quoting from *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326 (1986), the Supreme Court warned that Article III concerns were not to be taken lightly or glossed over by either trial courts or other reviewing tribunals:

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[14] Before the Ninth Circuit handed down its opinion, the State Attorney General notified the court that the plaintiff had left her State job and, therefore, the case was moot. *Arizonans for Official English, supra,* at 1065. The Ninth Circuit rejected the mootness argument and "implicitly" found that the plaintiff had standing because her "constitutional claims could allow her an award of nominal damages." *Id.* The Ninth Circuit reasoned that although the plaintiff's complaint did not explicitly request nominal damages, "it did request 'all other relief that the Court deems just and proper under the circumstances.' " *Id.* (quoting *Yniguez v. Arizona,* 975 F.2d at 647). Therefore, the Court of Appeals concluded that one could regard the District Court's judgment as including an "implicit denial" of nominal damages. *Id.*

> "Every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. *Mitchell v. Maurer*, 293 U.S. 237, 244, 79 L. Ed. 338, 55 S. Ct. 162 (1934). *See Juidice v. Vail*, 430 U.S. 327, 331-332, 51 L. Ed. 2d 376, 97 S. Ct. 1211 (1977) (standing). 'And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [*When the lower federal court*] *lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.' United States v. Corrick*, 298 U.S. 435, 440, 80 L. Ed. 1263, 56 S. Ct. 829 (1936) (footnotes omitted)."

Arizonans for Official English, supra, at 1071-1072 (brackets in original) (emphasis added).

Equally important, the *Arizonans* decision established the proper procedure which needs to be taken when trial courts and appellate tribunals act despite the fact that Article III standing has disappeared. When a civil case becomes moot pending appellate adjudication, the preferred practice is for an appellate court to reverse or vacate the judgment below and remand with a direction to dismiss. *Arizonans, supra*, at 71. The rational for this decision is to allow vacator to "clear the path for future relitigation" by others who might have an actual interest in the litigation by eliminating a judgment the loser was stopped from opposing on direct appeal. *Id.* On this basis,

the Supreme Court specifically vacated the prior appellate court rulings because, like the lower court orders, they were "unwarranted." *Id.* at 73.

Along the same lines, the Ninth Circuit in *Dufresne v. Veneman*, 114 F.3d 952 (9th Cir. 1997), diligently followed the legal authority of *Arizonans for Official English* and dismissed as moot an action brought by a plaintiff who sued the California Department of Agriculture to enjoin the spraying of pesticides that helped eradicate the Mediterranean fruit fly because the State of California had discontinued the spraying program. Specifically, this Court ruled that if a "case has become moot, even while on appeal, we are required to dismiss it. *See Arizonans for Official English v. Arizona*, 137 L. Ed. 2d 170, 117 S. Ct. 1055, 1068 (1997) ("To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.' ")." *Dufresne v. Veneman*, 114 F.3d at 954.[15]

Following up on the holdings in *Arizonans* and *Dufresne*, the Ninth Circuit confronted the issue of standing and, in particular, the mootness doctrine in the case of *Di Giorgio v. Josephine Lee and County of Los Angeles*, 134

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[15] In the context of securities cases, numerous courts have held that the sale of stock by a party undermines standing and renders a case moot. *See, e.g., Fischer v. CF&I Steel Corporation*, 599 F. Supp. 340 (S.D.N.Y. 1984) (Plaintiffs lost standing to maintain derivative suit when they no longer maintained stock in acquired company); *Lewis v. Anderson*, 477 A.2d 1040 (Del. 1984); *Trane Company v. O'Connor Securities*, 718 F.2d 26 (2nd Cir. 1983) (Appeal from denial of preliminary injunction dismissed as moot when defendants sold their stock in plaintiff corporation).

F.3d 971 (9th Cir. 1998). In *Di Giorgio,* the appellants appealed a ruling which enjoined them from enforcing a writ of possession pursuant to California Code of Civil Procedure § 715.050. *Id.* at 973-974. The appellants had sought to enforce the writ after the appellees failed to pay rent on property leased to them. Four days before the final lockout date, the appellees concurrently filed for a voluntary Chapter 7 petition under the Bankruptcy Code and an adversary proceeding which sought to permanently enjoin the writ of possession by the appellants. The appellees were still in possession of the rental property at the commencement of the adversary proceeding. *Id.*

Before the hearing in bankruptcy court however, the appellees voluntarily surrendered possession of the leased property. *Di Giorgio, supra* at 974. Even though the appellees vacated the property, the bankruptcy court determined that an actual controversy existed between the parties and permanently enjoined the enforcement of the writ of possession. *Id.* On appeal, the district court observed that the bankruptcy court made no formal findings regarding the actual date on which the appellees vacated the rental property and concluded that it would be inappropriate for a court exercising appellate jurisdiction to consider facts beyond the formal findings. *Id.* On this basis, the district court declined to hold that the appellees' action was moot. *Id.*

On review, the Ninth Circuit ruled that because the case became moot before the entry of the injunction, the ruling of the bankruptcy court had to be vacated and remanded with instructions to dismiss. *Di Giorgio, supra* at 975. Specifically, the Ninth Circuit held:

> As debtors occupying rental property subject to a writ of possession, [appellees] properly could challenge [the writ of possession] when they filed their bankruptcy petition. *See Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1069 (1997). However, the [appellees'] action ceased to be a "present live controversy" the moment [they] vacated the rental property. *See id.* Because the [appellees] did not possess property subject to a writ of possession at the time of the hearing in bankruptcy court, they "lacked a legally cognizable interest in the outcome" of the adversary proceeding. *See Powell v. McCormack*, 395 U.S. 486, 496, 23 L. Ed. 2d 491, 89 S. Ct. 1944 (1969). The bankruptcy court erred by not dismissing the [appellees'] action as moot.

Di Giorgio, supra, at 974.

Both the previously referenced *Steel Company* decision as well as the holding in *Di Giorgio* support Petitioners' argument that because federal courts must hear only live cases and controversies and are precluded from rendering advisory opinions, the Orders emanating from Objector's improper and mooted objection must be vacated. In both *Steel Company* and *Arizonans*, the Supreme Court concluded that the appellate decisions were moot because no actionable claim for relief was ever demonstrated at various times during the course of the litigation process. Similarly, in *Di Giorgio*, the Ninth Circuit held that while the case may have been properly filed, it became moot when the appellee relinquished the property which was the focus of the relief sought. The Ninth Circuit added that the appellees could not identify any exception to the mootness doctrine.

In the present case, the District Court erred upon remand in allowing this case to proceed because the record clearly established that Kaufmann lacked the requisite standing. The Ninth Circuit compounded this error by refusing to acknowledge that both its prior ruling and all subsequent rulings from the District Court were rendered nugatory because of a lack of a *real* controversy. Consequently, given the scope and weight of the legal authority cited above and the discovered facts presented to both the District Court and the Ninth Circuit which conclusively established Kaufmann's lack of standing, Petitioners request that this Court follow recent precedent and sound policies of judicial administration by adhering to the strictures of Article III mandates by striking all prior orders based on the Objector's participation in the underlying litigation as moot.[16]

CONCLUSION

The United States Supreme Court and other tribunals have made it abundantly clear that a party seeking to invoke the judicial authority of the federal courts must allege an actual case or controversy to avoid turning the federal judicial process into "no more than a vehicle for the vindication of the value interests of concerned bystanders." *Valley Forge, supra,* at 473. Clearly, Objector Kaufmann, who alleged no actual or threatened injury

[16] Also see *People Organized for Welfare & Employment Rights v. Thompson,* 727 F.2d 167 (7th Cir. 1984) (Judgment of district court vacated and the case remanded with directions to dismiss and vacate all judicial orders in the case).

and suffered no injury likely to be redressed by a favorable decision, has sought to invoke the judicial process simply for the sake of voicing his objections "as a matter of principle." App. at 92-97, 104-108, 135-143. Therefore, under this Court's holdings in *Valley Forge, Steel Company* and *Arizonans*, Kaufmann's lack of standing and concomitant mootness of the subsequent proceedings, dictate that the Ninth Court's remand of the action to the District Court and all orders and appellate opinions emanating from Objector Kaufmann's actions should be vacated and the original Settlement and award of attorneys' fees previously agreed to by the parties and approved by the District Court should be reinstated.

Dated: January 14, 2000

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT ZUCKER; SARAH MANDELBAUM, *Plaintiffs-Appellants,*	)	
WEISS & YOURMAN; STULL, STULL & BRODY, *Appellants,*	)	No. 97-56270
	)	D.C. No.
v.	)	CV-91-00214-JMI (RCx)
OCCIDENTAL PETROLEUM CORPORATION; RAY IRANI; HOWARD COLLINS, *Defendants-Appellees,*	)	OPINION
WALTER KAUFMANN, *Appellee.*	)	

Appeal from the United States District Court for the Central District of California James M. Ideman, District Judge, Presiding

Argued and Submitted
November 2, 1998 – Pasadena, California

Filed October 19, 1999

Before: Alex Kozinski and Andrew J. Kleinfeld, Circuit Judges, and Owen M. Panner,[1] Senior District Judge.

Opinion by Judge Kleinfeld

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[1] The Honorable Owen M. Panner, Senior District Court Judge for the District of Oregon, sitting by designation.

COUNSEL

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LAwrence W. Schonbrun, Berkeley, California, for appellee Walter Kaufmann.

OPINION

KLEINFELD, Circuit Judge:

This case involves attorneys' fees in a securities fraud class action.

FACTS

Occidental Petroleum had for many years paid dividends of $2.50 per share, whether it made that much money or not. When it was short of profits to pay the dividends, it sometimes sold assets to cover the $2.50. In the fall and winter of 1990, the chairman of the board and company officials told the media that they remained committed to the dividend policy.

But the policy changed on January 14, 1991. Occidental announced that the dividend would be $1.00 per share instead of $2.50. Three law firms filed a class action on behalf of people who had bought Occidental stock between September 18, 1990, the first assurance of the $2.50 mentioned in the complaint, and January 11, 1991, when the policy changed. The plaintiffs' theory was that Occidental lulled purchasers into thinking they were buying a $2.50 per share stream of income they could count

on, and then left them with a much smaller and less certain stream of income.

The class action settled. Nothing about the securities fraud claim is now in dispute. This dispute is solely about attorneys' fees. It arises because, in the settlement, the attorneys got about $3 million in fees (initially), and the class members got no cash at all. On settlement, Occidental promised the class members that, beginning in 1997, dividends would be set according to a formula yielding $1.00 or fifty cents on the dollar of earnings, whichever was more, through 1997, subject to the directors' business judgment and other qualifications.[2] The settlement

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[2] Here is the language of the settlement agreement:

(1) It will be the policy of Occidental's Board to maintain the annual dividend on Occidental's outstanding shares of common stock at no less than $1.00 per share through 1997:(2) It will be the policy of Occidental's Board to pay as annual dividends on its outstanding shares of common stock 50% of Occidental's earnings applicable to common stock, if such earnings on a recurring and sustainable basis, as the Board shall determine, exceed $2.00 per share per annum, and to maintain that policy at least through 1997; (3) The Board's policy will be that, if recurring earnings on a sustainable basis, as the Board shall determine, do not exceed $2.00 per share in 1993, 1994 or 1995, the dividend policy set forth above will extend to 1996 and 1997 at the rate of 60% of recurring earnings on a sustained basis, as the Board shall determine; (4) The above-described Dividend Policy will be subject to the exercise by the Board of its fiduciary obligations, and the exercise of the Board's business judgment in connection with, among other things, the declaration of future dividends, as well as to any and all requirements of Delaware law or any

provided that plaintiffs' attorneys would ask the court to approve fees and reimbursements not to exceed $2,975,000, to be paid by defendants, and defendants would not oppose the request.

On February 24, 1993, Walter Kaufmann, represented by Lawrence W. Schonbrun, filed notice that, as a member of the proposed settlement class, he intended to object to the merits of the settlement and to the amount of attorneys' fees. Over objection, the district court approved the settlement on November 1, 1993, and awarded attorneys' fees in the amount of $2,975,000 to the plaintiffs' class counsel.

Mr. Kaufmann appealed, arguing that the district court denied him due process by not giving him a hearing on his objection, and that the attorneys' fee award was excessive. We implicitly rejected plaintiffs' argument that Mr. Kaufmann lacked standing, and rejected Mr. Kaufmann's due process argument. But we vacated the attorneys' fees award and remanded, because the district court had not articulated adequately its reasons for approving the fee.[3]

On remand, the district court cut the fee from almost $3 million to a little over $1 million. Plaintiffs' attorneys again argued that Kaufmann lacked standing for purposes of Article III jurisdiction, but the district judge read

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other applicable law, and to any and all covenants, restrictions or limitations in connection with any financing, now or in the future.

[3] *Zucker v. Occidental Petroleum Corp.*, 68 F.3d 482 (table) (9th Cir. 1995) (unpublished memorandum disposition).

our disposition as implicitly rejecting that argument. The district judge rejected the plaintiffs' attorneys' argument that their fees should be a percentage of the increase in value in Occidental's stock, because the claim that their work caused the increase was unpersuasive speculation. The "lodestar" amount was $1,397,107. The judge articulated several reasons why a risk multiplier should not be applied, among them that "the Settlement Agreement did not provide for one dime of direct compensation to the class." Because the district judge also thought that the attorneys' claimed rates were high, the attorneys had not submitted evidence of current prevailing rates in the community, and some aspects of the charges were high, he reduced the lodestar to $1,151,527.80. For knocking roughly $2 million off the plaintiffs' attorneys' fees, Kaufmann was awarded $48,774.62 in attorneys' fees.

This appeal is by the class action plaintiffs. Their only point on appeal is that Kaufmann lacked standing to object to the attorneys' fee award. They ask us to vacate the district court judgment cutting their fee award to $1 million, and restore the $3 million in fees initially awarded.

ANALYSIS

Class actions commonly produce a common fund from which attorneys' fees are drawn, with the residue to be paid to the class.[4] The particularized, traceable,

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[4] *See In re Coordinated Pretrial Proceedings*, 109 F.3d 602, 608 (9th Cir. 1997).

remediable injury necessary for an objector's standing[5] arises from his claim on his share of whatever is left in the pot after attorneys' fees are withdrawn.

The peculiarity that gives rise to the standing argument is that the class did not get a dime in cash. If it had, this would probably be a common fund case. Because the class members got no cash, there was no common fund, and class members do not pay the fee out of their money. Thus Kaufmann does not lose money out of his own pocket to the extent that it is paid to the class's lawyers. Instead, the defendant pays it, based on negotiations between the defendant and the plaintiff class's attorneys. The plaintiffs' theory is that if the fees are higher or lower, it affects only plaintiffs' attorneys and defendants, not the class members. They argue that because Kaufmann sold his Occidental stock, he does not even have an interest in whether the corporate treasury is unduly depleted.

The issue of standing is difficult. Whether a class member has standing to challenge a class action settlement is an open question in this circuit, and other circuits have split on whether the challenger must be an intervenor.[6] The question of whether a class member has

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[5] *See Snake River Farmers' Assoc., Inc. v. United States Dep't of Labor*, 9 F.3d 792, 795 (9th Cir. 1993) ("The federal courts lack power to make a decision unless the plaintiff has suffered an injury in fact, traceable to the challenged action, and likely to be redressed by a favorable decision.").

[6] *Compare Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998) (restricting standing to challenge settlement to class members who intervened in class action); *Shults v. Champion Int'l Corp.*, 35

standing to challenge the award of attorneys' fees is a separate question that may be resolved differently.[7] In a case where the objector, not the attorneys for the plaintiff class as in this case, appealed, the Tenth Circuit held that a non-intervening objector has standing to challenge attorneys' fees, even though he does not have standing to challenge the settlement of the substantive claim.[8] On the one hand, it is hard to see how cutting plaintiffs' attorneys' fees can do Kaufmann any good. He gets the same money whether the fee is cut or not – none – and the same promise regarding future dividends. If cutting the fee cannot affect him, then it is not immediately apparent how any harm to him is "likely to be redressed by a favorable decision."[9] On the other hand, a client whose attorney accepts payment, without his consent, from the defendants he is suing, may have a remedy, and this remedy may extend to a plaintiff class whose class attorneys accept payment from the defendants the class is suing.

F.3d 1056, 1061 (6th Cir. 1994) (same); *Gottlieb v. Wiles*, 11 F.3d 1004, 1009 (10th Cir. 1993) (same); *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 679-80 (8th Cir. 1992) (same); *Walker v. City of Mesquite*, 858 F.2d 1071, 1074 (5th Cir. 1988) (same); *Guthrie v. Evans*, 815 F.2d 626, 628-29 (11th Cir. 1987) (same) with *Carlough v. Amchem Prods., Inc.*, 5 F.3d 707, 713-14 (3d Cir. 1993) (granting standing to challenge class action settlement to nonnamed members).

[7] *See Rosenbaum v. MacAllister*, 64 F.3d 1439, 1442-43 (10th Cir. 1995) (holding that nonintervenor class member has standing to appeal attorney's fees).

[8] *See id.*

[9] *Snake River Farmers' Assoc.*, 9 F.3d at 795.

The principles of agency are useful to illustrate how a class member has an interest in attorneys' fees, even outside the common fund situation. For an agent to accept money from a third party without the principal's consent in the matter for which the agent is employed may be a breach of the agent's fiduciary duty to the principal, because the money may be an inducement to serve the third party's rather than the principal's interests.[10] A client who employs a lawyer to litigate against a third party has a legitimate interest in having his lawyer refrain from taking the third party's money in exchange for throwing the fight. (This is a discussion about the agency principles generally affecting standing, and we intimate no suggestion that the lawyers in the case at bar acted improperly.) When an agent does take money from the third party in the matter of the agency without his principal's consent, he is sometimes deemed to hold the

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[10] *See Jerlyn Yacht Sales, Inc. v. Wayne R. Roman Yacht Brokerage*, 950 F.2d 60, 67 (1st Cir. 1991) (stating that "absent an agreement to the contrary, 'an agent who, without the knowledge of the principal, receives something in connection with, or because of, a transaction conducted for the principal, has a duty to pay this to the principal even though otherwise he has acted with perfect fairness to the principal and violates no duty of loyalty in receiving the amount' ") (quoting Restatement 2d of Agency, § 388 cmt. a); *see also* W. Edward Sell, *Sell on Agency* § 134, at 122 (1975) ("Where the agent receives a substantial amount of money or other property from the third party, this is sufficient to infer that he is acting for that party and will support a judgment against the agent for breach of this duty.").

money in a constructive trust for his principal.[11] Under this rule, Kaufmann could have a remediable injury, if he were entitled to a proportionate share of the class lawyers' $3 million.

These agency principles apply with special vigor to attorneys. Canon 38 of the Canons of Ethics provided that a lawyer could accept nothing bearing on the matters for which he was employed, without "knowledge and consent of his client after full disclosure."[12] Disclosure was necessary but not sufficient, because the lawyer might "by accepting or bargaining for any compensation from the other side, even if fully disclosed to his client, put himself in a position which will interfere with his wholehearted duty to his client."[13] The current Rules of Professional Conduct carry this principle forward with the formulation that a "lawyer shall not accept compensation for representing a client from one other than the client unless: . . . the client consents . . . ; [and] there is no interference with the lawyer's independence of judgment."[14] As the official comment says, "[w]here the client is a class, consent may be obtained on behalf of the class by court-supervised procedure."[15]

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[11] *See* W. Edward Sell, *Sell on Agency* § 132, at 122 (1975) ("In all cases, the agent is held to be a[ ] constructive trustee of the unauthorized profit for the principal.").

[12] Model Code of Professional Responsibility Canon 38 (1980).

[13] Henry S. Drinker, Legal Ethics 97 (1953).

[14] Model Rules of Professional Conduct Rule 1.8(f) (1983).

[15] *Id.* cmt. (4).

In a class action, substantial justice may require the court do more than encourage settlement. The absence of individual clients controlling the litigation for their own benefit creates opportunities for collusive arrangements in which defendants can pay the attorneys for the plaintiff class enough money to induce them to settle the class action for too little benefit to the class (or too much benefit to the attorneys, if the claim is weak but the risks to the defendants high).[16] The risk of collusion may be especially high if defendants can buy off the attorneys with money from their directors' and officers' liability insurance policy, and avoid spending their own money. The supervisory power of the district court affords a mechanism for assuring loyal performance of the attorneys' fiduciary duty to the class. Because of the attorneys' fiduciary responsibility to the class, of which Kaufmann was an economically interested member, and the possibility of a constructive trust had fiduciary duties been found to have been breached, it may well be that despite having sold his stock prior to the attorneys' fees award, Kaufmann retained standing to object to the amount of attorneys' fees.

Plaintiffs argue that *In re First Capital Holdings Corp. Securities Litigation*[17] requires this court to hold that Kaufmann has no standing to object, so that the district court order cutting the fee should be vacated. We held in *First Capital* that a class member lacked standing to appeal an attorneys' fees award, because she did not

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[16] *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801-06 (3d Cir. 1995).

[17] 33 F.3d 29 (9th Cir. 1994).

suffer the injuries for which the class action was brought. That case is distinguishable, both because Kaufmann is not appealing, and because he did suffer the claimed injury for which the class action was brought, purchase of stock on a false assurance of a stream of $2.50 dividends. We carefully noted in *First Capital* that the appellant's "lack of injury [was] unique," "[t]he fact that attorneys fees were separately negotiated and funded has nothing to do with the outcome," and "[w]e do not decide the question whether another class member could attack the fee award."[18] Judge Sneed, dissenting, thought that "[a]rguably, a class member always retains an interest in attorney fees, even when her claims have been met in full."[19] *First Capital* establishes that where a class action is brought on account of an economic injury, and the particular class member did not suffer the economic injury which furnished the basis for the class action, that individual lacks standing to appeal the attorneys' fees award. The economic injury for which the class action was brought, not economic injury from the attorneys' fees, is what *First Capital* spoke to. The class was evidently defined somewhat broadly in that case, and included people like the appellant who had not been harmed. We expressly refrained from addressing the question whether members of the class who had suffered the injury for which the action was brought could object to attorneys' fees.

In this case, we need not decide whether Kaufmann would have standing to appeal. He has not appealed;

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[18] *Id.* at 30 n. 1.

[19] *Id.* at 31.

plaintiffs have. Nor need we decide whether the $3 million fee should be reinstated; it is law of the case that the fee award has been vacated because the district court did not articulate a sufficient basis for it. More important, we need not decide whether Kaufmann had standing to object to attorneys' fees. No one needed standing, or needed to object, for the district court to reconsider the amount of attorneys' fees and decide upon an amount. Because of our previous decision vacating the $3 million award, the district court had to decide upon an award and articulate its reasoning to comply with our mandate. In a class action, whether the attorneys' fees come from a common fund or are otherwise paid, the district court must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper.[20] This duty of the court exists independently of any objection. Therefore it exists, *a fortiori*, regardless of whether an objector has a remediable economic stake in the court's decision. Because the district court had the

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[20] *See Parker v. Anderson*, 667 F.2d 1204, 1214 (5th Cir. 1982) ("The evil feared in some settlements – unscrupulous attorneys negotiating large attorney's fees at the expense of an inadequate settlement for the client – can best be met by a careful district judge, sensitive to the problem, properly evaluating the adequacy of the settlement for the class and determining and setting a reasonable attorney's fee. . . . "); *see also In re Coordinated Pretrial Proceedings*, 109 F.3d 602, 608 (9th Cir. 1997) ("In a common fund case, the judge must look out for the interests of the beneficiaries, to make sure that they obtain sufficient financial benefit after the lawyers are paid. Their interests are not represented in the fee award proceedings by the lawyers seeking fees from the common fund."); *Jordan v. Mark VI Hair Styles, Inc.*, 806 F.2d 695, 697 (6th Cir. 1986); *Dunn v. H.K. Porter Co.*, 602 F.2d 1105, 1109 (3d Cir. 1979).

authority and duty to pass upon the fairness of the attorneys' fees settlement independently of whether there was objection, we need not decide whether the objector had standing.

No Article III case or controversy is needed with regard to attorneys' fees as such, because they are but an ancillary matter over which the district court retains equitable jurisdiction even when the underlying case is moot.[21] Its jurisdiction outlasts the "case or controversy." Our conclusion that we need not decide whether Kaufmann had standing is consistent with the reasoning of the Eighth Circuit.[22] It found that because "the reasonableness of attorneys' fees is within the overall supervisory responsibility" of the court in a class action, the court did not need to reach the question of whether an objector has standing.[23]

Kaufmann's standing to sue is not at issue, because he did not sue; the class did. Kaufmann's standing to object need not be decided, because the district court had to decide how much to approve in attorneys' fees whether he objected or not. And his standing to appeal is not at issue because, in the case now before us, he did not appeal. The contribution his attorney made, by providing an adversarial context in which the district court could evaluate the fairness of attorneys' fees, was substantial. Because the district court had to make this determination

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[21] *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990); *Cammermeyer v. Perry*, 97 F.3d 1235, 1238 (9th Cir. 1996).

[22] *See Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975).

[23] *Id.* at 127 n. 13.

regardless of whether Kaufmann had standing, we need not decide whether he did.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALBERT ZUCKER and SARAH MANDELBAUM, Plaintiffs, v. OCCIDENTAL PETROLEUM CORP., RAY IRANI and HOWARD COLLINS, Defendants.	CASE NO. CV-91-0214 JMI (Tx) ~~[PROPOSED]~~ FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE

THIS MATTER has come before the Court to determine whether there is any cause why this court should not approve the proposed settlement (the "Settlement") set forth in the Stipulation of Settlement, dated as of December 21, 1992 (the "Stipulation"), relating to the above-captioned action. The Court has considered all papers filed and proceedings had herein, and otherwise is fully informed in the premises, and has determined that the Settlement set forth in the Stipulation should be approved as fair, reasonable and adequate. The Court hereby enters this Final Judgment, which constitutes a final adjudication of this matter on the merits. Good cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties to this litigation, including all members of the Settlement Class, as defined below.

2. The definition of terms set forth in the Stipulation and in the Preliminary Order entered by this Court on December 23, 1992, are hereby incorporated herein as though fully set forth in this Final Judgment.

3. The Court hereby approves the Settlement set forth in the Stipulation and finds that said Settlement is, in all respects, fair, reasonable, and adequate to the Settlement Class, and within the authority of the parties. The Court has considered any and all objections made by Settlement Class Members and finds such objections to be without merit. The Settlement Class, as defined in the Stipulation and used herein, means a class consisting of all persons and entities who purchased or otherwise acquired the common stock of Occidental Petroleum Corporation at any time between December 1, 1989 and November 30, 1991, and who have not timely and validly requested exclusion from the Settlement Class pursuant to the Notice of Pendency of Class Action, Class Action Determination, Proposed Settlement, and Settlement Hearing ("Settlement Notice"), or who have been reinstated by the Court as Settlement Notice"), or who have been reinstated by the Court as Settlement Class Members. The Court further finds that the named plaintiffs in this action, and their counsel, are fair and adequate representatives of the interests of the Settlement Class Members.

4. Neither this Final Judgment, the Stipulation, nor the Settlement is an admission or indication by the Defendants, or any of them, of the validity of any claims in this action or of any liability or wrongdoing by them or any of them or of any violation of law; the Final Judgment, Stipulation, and Settlement are not a concession and shall

not in any way be used as an admission or indication with respect to any claim of any wrongdoing, fault, or omission by any Defendant or any other person in connection with any transaction or occurrence or any statement, release, or written document issues, filed or made; and neither this Final Judgment, the Stipulation, nor the Settlement, nor any related document, proceeding, or action, nor any report or account thereof, shall be offered or received in evidence in any civil, criminal, or administrative action or proceeding other than such proceedings as may be necessary to consummate or enforce the Final Judgment, the Stipulation or the Settlement.

5. Except as to those persons who have validly and timely requested exclusion form the Settlement Class and who have not been reinstated (which persons are identified in Exhibit A hereto), this Court hereby dismisses the above-captioned action on the merits and with prejudice against all persons and entities who are members of the Settlement Class in favor of each and all of the Defendants and without costs to any of the parties as against any other settling party, except as provided in the Stipulation.

6. All persons and entities who are members of the Settlement Class, and each Settlement Class member's issues, heirs, spouses, representatives, successors, and assigns, are hereby barred and permanently enjoined from prosecuting, commencing, or continuing any claims, causes of action, damages and liabilities of any kind, nature, and character whatsoever in law, equity, or otherwise, known or unknown, suspected or unsuspected, with respect to any of the Released Claims as against any of the Released Parties, as those terms are defined in the

Stipulation. Settlement Class Members who have validly and timely requested exclusion form the Settlement Class may pursue their own individual remedies, if any.

7. The Court hereby approves the terms of the Settlement, as set out in the Stipulation.

8. The Settlement Notice given to the Settlement Class, which Notice sets forth the principal terms of the Stipulation and other matters set forth herein, was the best notice practicable under the circumstances, including individual notice to all members of the Settlement Class who could be identified through reasonable efforts. Said Notice provided due and adequate notice of these proceedings and of the matters set forth therein, including the Settlement set forth in the Stipulation, to all persons entitled to such notice, and said Notice fully satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure and the requirements of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

9. Plaintiffs' Counsel are awarded attorneys' fees and reimbursement of expenses in the amount of $2,975,000.00, plus interest running from December 23, 1992.

10. Without affecting the finality of this judgment in any way, this Court hereby retains continuing jurisdiction over: (a) this action until this Final Judgment becomes effective and each and every act agreed to be performed by the parties has been performed pursuant to the Stipulation; and (b) all parties to this action for the purposes of enforcing the Stipulation.

11. If the Settlement does not become effective in accordance with the terms of the Stipulation, then this Final Judgment shall be rendered null and void and shall be vacated and, in such event, all orders entered in connection therewith shall be vacated and rendered null and void.

12. It is expressly determined, within the meaning of Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay and the entry of this Final Judgment is hereby expressly directed by the Court.

Dated: 1 Nov 93

/s/ Ideman
United States District Judge

[Exhibit A Omitted In Printing]

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALBERT ZUCKER and SARAH MANDELBAUM, Plaintiffs, -against- OCCIDENTAL PETROLEUM CORP., RAY IRANI and HOWARD COLLINS, Defendants.	Case No. CV-91-0214 JMI (Tx) PLAINTIFFS' REPLY MEMORANDUM OF LAW JUSTIFYING ATTORNEYS' FEES DATE: Under Submission TIME: Under Submission CTRM: The Honorable James M. Ideman (Filed May 2, 1997)

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Plaintiffs respectfully submit this reply memorandum in further support of the Class counsel's prior application for an award of attorneys' fees and expenses in the amount of $2,975,000.

I. Preliminary Statement

This Court's initial award of Class counsel's fees and expenses in the amount of $2,975,000 was proper and fully justified based on the substantial benefits conferred on the Class. The most telling signs of the success of the Settlement are the irrefutable facts that (i) since the parties had entered into the Settlement, Occidental has distributed approximately $1.4 billion in dividend payments to Occidental shareholders[1]; and (ii) the market's favorable reaction to the Settlement as demonstrated by the substantial increases in Occidental's stock price. Class counsel's fees, which were the product of intense negotiations between the parties with the assistance of retired Judge J. Lawrence Irving, are also justified by the hard work that Class counsel devoted to prosecuting this action, especially in light of the extraordinary risks confronted by Class counsel concerning issues of liability and damages. Yet, while the parties reached this excellent Settlement over three years ago, and the Settlement achieved was subsequently approved by this Court and the Ninth Circuit as fair and reasonable, Class counsel has been forced to defend the value of the Settlement

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[1] The terms "Settlement" and "Settlement Agreement" refer to the Stipulation of Settlement entered into between the parties and filed with this Court on or about December 23, 1992.

from the baseless attacks of objector Walter Kaufmann ("Objector" or "Kaufmann") and, more accurately, Objector's counsel Lawrence Schonbrun ("Objector's counsel" or "Schonbrun"). As discussed further below, the Settlement achieved by Class counsel has proven to be very successful and the fees and expenses awarded to Class counsel were warranted.

In support of Class counsel's application for fees and expenses, Class counsel will demonstrate the following:

a) Kaufmann is not an aggrieved Class member and therefore lacks the required standing to assert any objections to either the Settlement or Class counsel's fee award;

b) Class counsel's experts' declarations support that the Settlement has conferred a substantial monetary benefit on the Class and that the market's reaction to the Settlement was very favorable and that those expert opinions are not rebutted by Objector's proposed experts.

c) Class counsel's efforts have imposed obligations on Occidental and its directors to abide by the dividend policy detailed in the Settlement Agreement;

d) The agreed-to fees negotiated with the assistance of Judge Irving and awarded to Class counsel, are supported by the substantial benefit doctrine, the percentage approach and the lodestar analysis; and

e) Objector's counsel's objections to the awarded fees are based upon improper motives of furthering objector's counsel's own financial and political agendas, and as such, Objector's objections should be overruled

and no attorneys' fees should be awarded to Objector's counsel.

II. The Objections To Class Counsel's Fee Award Are Improper Because Objector Lacks Standing To Object To Either The Settlement Or Attorneys' Fee Award[2]

The Settlement in this action was approved by this Court on November 1, 1993. Objector did not appeal the validity of the Settlement. Thus, at this time, Objector has no standing to object to the Settlement. Objector, likewise, has no standing to object to the award of attorneys' fees.

It is well recognized in this Circuit that in order for a class member to Object to a proposed settlement or attorneys' fees, that class member must have standing to object. Neither Objector nor his counsel has the required standing to object to either the Settlement or award of Class counsel's fees in this action. In *In re First Capital Holdings Corporation Financial Products Securities Litigation*, 33 F.3d 29 (9th Cir. 1994), the Ninth Circuit confronted this very same issue. As stated by the Ninth Circuit:

> The power of federal courts to hear cases is always subject to the constraints set forth in Article III of the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-75, 2 L.Ed. 60

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[2] For a description of the claims alleged in the complaint, the procedural background, the history of the appeal and the terms of the Settlement, plaintiffs refer the Court to the Settlement Agreement and Plaintiffs' Memorandum Justifying Attorneys' Fees (Pltffs' Mem.) at 1-4.

> (1803). Article III "requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 70 L.Ed.2d 700, 102 S. Ct. 752 (1982).

Id. at 30. Importantly, the Ninth Circuit further stated that:

> *Simply being a member of a class is not enough to establish standing. One must be an aggrieved class member.* This was made clear by the Marshal court's reliance upon *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 32-33 (3d Cir. 1971). In *Ace*, the Third Circuit recognized that "[o]rdinarily, aggrieved class members may appeal any final order of a district court in proceedings held pursuant to rule 23." . . . The word "aggrieved" is a necessary, not merely descriptive, term. It is necessary to make the statement compatible with Article III requirements and is a recognition that not all class members will be aggrieved by all decisions.

Id. (Emphasis added).

In accordance with the above well established principles, the Ninth Circuit in *First Capital Holdings* ruled that class member Wolford lacked standing to object to the attorneys' fees because Wolford *"asserts no economic or noneconomic injury. She suffered no injury 'likely to be redressed by a favorable decision.' Valley Forge*, 454 U.S. at

472." *See also, Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 2140-42 (1992) (plaintiffs lacked standing in part because injury asserted was not redressable by action brought)." *Id.* (Emphasis added).

Similar to the *First Capital Holdings* case, the Objector in the present action has not alleged (nor could he) any injury of any kind as a result of the approved Settlement and awarded attorneys' fees and cannot benefit by the Court altering its previous order. This fact is not only undisputed, but Objector has admitted that he is not interested in the issue of personal damages. Class counsel refers the Court to the following relevant testimony:

> Q. Mr. Kaufmann, are you claiming that you've personally suffered any damages as a result of either the settlement or the fees award?
>
> * * *
>
> A. I'm not sure whether I have any personal damages or not. I'm basically objecting to it as a matter of principle. If I do have damages, they'd be relatively small, since I only owned 400 shares, and I'm not sure exactly when I sold them. So actually, my answer is, I don't know.
>
> Q. So I also assume – I assume, then, that you didn't conduct any independent study or investigation to determine whether you suffered any monetary damages?
>
> A. . . . – I'm not interested in the issue of personal monetary damages.

See Declaration of James E. Tullman ("Tullman Decl."), Exhibit A at 010, filed concurrently herewith.

Kaufmann further testified that he is not seeking any monetary award as a result of filing his objection.

> Q. Mr. Kaufmann, do you expect to obtain any monetary award as a result of filing your objection?
>
> A. Not – I don't have any expectations of a monetary award.

Id. at 012.[3]

Similarly, Objector's counsel also testified that whether Objector suffered any damages is not relevant to his objections.

> Q. Mr. Schonbrun, are you claiming that your client suffered any damages as a result of the settlement or the awarded attorney's fees?
>
> A. I think I have to say I don't know. In other words, I don't believe that it's an issue.
>
> * * *
>
> Q. Do you believe whether the class suffered any damages as a result of the settlement or awarded attorney's fees is relevant to the issues before the court?

---

[3] Kaufmann also testified that he had sold all of his Occidental shares sometime before 1995. (Class counsel has requested on numerous occasions, Mr. Kaufmann's sale confirms for his Occidental shares. Even in light of Magistrate Chapman's Order, Objector's counsel has continuously refused.) Thus, to the extent that Objector and Objector's counsel are attempting to increase Occidental's treasury from a reduction of the fees, Kaufmann will not benefit a penny because he is no longer an Occidental shareholder. *Id.* at 007.

> A. I don't think – I don't think it's an issue.

Tullman Decl. Exhibit B at 045.

Accordingly, because Objector does not allege any economic or noneconomic injuries and that no injuries will be redressed by any action undertaken by this Court, Objector lacks the required standing to object to the awarded attorneys' fees. Accordingly, Objector's objections to the awarded attorneys' fees must be overruled in their entirety.

III. Class Counsel's Experts Confirm That The Settlement Has Conferred A Substantial Monetary Benefit On The Class And Those Opinions Are Not Rebutted By Objector's Proposed Experts

As discussed at length in plaintiffs' opening memorandum, plaintiffs' experts' opinions support Class counsel's position that the Settlement has conferred a substantial monetary benefit on the Class. See Pltffs' Mem. at 5-11. In support of the substantial benefit conferred on the Class, Professor Murray opined, among other things, that

> In my opinion, Occidental shareholders, whether individual or institutional, will view the terms of the proposed settlement as adding substantial value to their investment of Oxy shares. At a price of $20 per share, the current $1.00 dividend provides a current return of 5%. The Court's approval of the terms of the settlement of this litigation will provide Occidental shareholders a "safety net" for the price of the Company's stock over the next 5 years, which,

while not fool proof, is certainly a significant consideration in valuing the price of Oxy's shares.

Indeed, since dissemination of the terms of the proposed settlement, as interest rates generally have declined to new lows, the price of Oxy's shares increased from approximately $17 per share to above $20 per share, an increase of $900 million. While not all of this increase is directly attributable only to the terms of the settlement, those terms are, in my opinion, a significant factor in the increase.

* * *

The dividend policy states, in part, that it will be the policy of Occidental's board to pay as annual dividends 50% of recurring and sustainable earnings, and that if recurring earnings on a sustainable basis do not exceed $2 per share in 1993, 1994 or 1995, then the policy will extend to 1996 and 1997 at a rate of 60% of earnings on a recurring and sustainable basis. This aspect of the policy has substantial additional value to shareholders. Because boards of directors prefer not to reduce dividends, there is a natural tendency for dividends to lag well behind growth in earnings. Only after a new higher level of earnings has been demonstrated over several years are directors typically prepared to make proportionate dividend increases. In the meantime, retained earnings are equivalent to a fully subscribed preemptive rights offering to existing stockholders. A high return on net worth has yet to be shown by Oxy, making new stock subscriptions less attractive.

* * *

> The five-year span of the dividend policy under the terms of the settlement enhances its value by extending assurance of the policy for the presumed full period of changes in corporate structure and lines of business. The added value of this assurance comes not only from the arithmetic of the time value of dividend payments but also for the related enhancement of investment policy.

Pltffs' Mem. at 7-9.

Likewise, Patrick J. Sheehan's opinion leaves little doubt that the Settlement has conferred a significant monetary benefit on the Class. In sum, Mr. Sheehan opined that the dividend policy adopted by Occidental pursuant to the Settlement placed Occidental's prospective dividend payments in the category of a corporate commitment much as interest on a debt. Through Mr. Sheehan's use of various dividend discount models and the further investment opportunity of the monies obtained through the dividend payments, Mr. Sheehan has calculated that the benefits conferred on the Class, as a result of the Settlement achieved by Class counsel, to be between $87.0 million and $159.0 million. Pltffs' Mem. at 10-11; *See also,* Declaration of Patrick Sheehan filed with this Court on January 26, 1996

As demonstrated by their resumes, both Professor Murray and Mr. Sheehan have extensive experience in securities analysis and use of dividend discount models, thus making them quite capable of rendering opinions concerning the value of the Settlement. Neither Objector nor Objector's counsel have contested any of plaintiffs'

experts' credentials or challenged either of plaintiffs' experts' ability to opine on the information that is contained in their expert opinions. In fact, both Objector and Objector's counsel have conceded that plaintiffs' experts have the ability to opine on the issues that are the primary focus of this dispute.

> Q. . . . did you read the opinions of the experts proffered by the plaintiffs in this litigation? One is Professor Murray, and the other one is Patrick Sheehan.
>
> A. I did a long time ago, prior to that.
>
> * * *
>
> Q. Did you look into their credentials with respect to their ability to opine on the issues of the dividend and the value of it to the Occidental shareholders?
>
> A. I think at the time I did. I remember that they had pretty good credentials. . . .
>
> Q. . . . did you have any concerns with their credentials as to their ability –
>
> A. No, I had no concerns with their credentials, no. None whatsoever.

Tullman Decl. Exhibit A at 015-16. Kaufmann Tr. at 61-62. Likewise, in response to a similar inquiry Objector's counsel testified that " . . . I don't think I could object on their ability to opine." Tullman Decl. Exhibit B at 053.

With respect to the expert opinions relied upon by Objector and Objector's counsel, the opinions rendered by those experts suffer from a number of severe fundamental flaws. The most obvious flaw of the opinions relied upon by Objector is that Professors Scott and Reiss'

analyses are premised under the assumption that the Settlement did not impose any additional obligation upon the directors of Occidental. According to professor Scott, "the Settlement conferred no meaningful legal benefit on Occidental shareholders. The Settlement consists of a statement of the dividend policy that had been followed by the Board for the prior two years, and contained no binding commitment by the Board to do anything in the future which it did not wish to do." Obj. Mem. Exhibit A at 3. Professor Scott's conclusory statements are far from accurate. As discussed further below, the Settlement has clearly imposed upon Occidental and its directors an obligation to abide by the dividend policy outlined in the Settlement Agreement.

Based on the fact that Professors Scott and Reiss failed to acknowledge that the Settlement had imposed any obligations on Occidental's directors to abide by the agreed to dividend policy, it is not surprising that Professors Scott and Reiss opined that the Settlement had conferred no significant benefit on Occidental's shareholders. In fact, Objector's proposed experts were not even asked to value the Settlement under the assumption that the Settlement had imposed upon Occidental's directors an obligation to abide by the dividend policy.

> Q. Did you ask them to value the settlement if in fact the settlement itself obligated Occidental to retain its dividend policy?
>
> A. . . . I mean, I can tell you what I did do. And I don't think I did that, no.

Tullman Decl. Exhibit B at 058.

Furthermore, Professors Scott and Reiss' opinions are flawed because they fail to recognize the most obvious ways to value the Settlement, specifically, (1) whether Occidental, since the parties entered into the Settlement, distributed dividends in accordance with the Settlement Agreement; (2) how much in dividend payments were distributed by Occidental since the defendants had entered into the Settlement Agreement; and (3) the substantial increase in Occidental's share price since the announcement of the Settlement. Since the Settlement has been entered between the parties, Occidental has made dividend payments consistent with the terms of the Settlement. The Total of Occidental's dividend payments are approximately $1.4 billion. Clearly, these facts cannot be ignored in evaluating the quality of the Settlement. Class counsel belief that their hard work in achieving the Settlement on behalf of the plaintiff Class played a significant role in making sure that Occidental shareholders would receive is $1.4 billion in dividend payments. Likewise, as discussed below, the substantial increase in Occidental's stock price within a short period of time after the announcement of the settlement is demonstrative of the success of the Settlement.

Moreover, the fact that Occidental has made its dividend payments since the Settlement was entered into demonstrates that Occidental took this Settlement very seriously. As such, it was reasonable for Patrick Sheehan to view the agreed to dividend policy as a debt obligation owed by Occidental, and value the Settlement between $87.0 million and $159.0 million. These facts further demonstrate that this Settlement can be valued and that Class counsel's efforts yielded extraordinary results.

Professors Scott and Reiss' evaluations of the Settlement are also flawed because the only way they evaluated the Settlement was based upon the movements of Occidental's stock price in reaction to the announcement of the Settlement, and in doing so, Professors Scott and Reiss have conveniently used a model that would purposely distort the market's reaction to the Settlement. The accompanying chart demonstrates that prior to the announcement of the Settlement Occidental shares were rapidly decreasing, and, within a short time after the parties had entered into the Settlement Agreement, Occidental common shares rose from $17.00 per share to over $23.00 per share. See Tullman Decl. Exhibit C. This tremendous increase in Occidental's stock price supports Class counsel's contention that the Settlement was well received by the investment community. As Professor Murray opined, "[w]hile not all of this increase is directly attributable only to the terms of the settlement, those terms are, in my opinion, a significant factor in the increase." Pltffs' Mem. at 7.

IV. The Settlement Has Conferred Significant Rights And Benefits Upon the Plaintiff Class

One of the Objector's chief arguments against the awarded attorneys' fees is the claim that the Class has not received any significant rights or benefits by way of the Settlement Agreement. Obj. Mem. at 3. In support of this dubious proposition, the Objector places inordinate reliance upon the Declaration of Professor Scott. A thorough review of his declaration reveals that not only has Professor Scott failed to cite a single legal authority for

his vague opinions, but many of his statements are unsupported by fact, law or common business practice.

Cavalierly disregarding the fact that Occidental has already paid 1.4 billion dollars in dividends since the Settlement was entered into between the parties, Professor Scott intimates that the policy under which these dividends were issued was little more than a reiteration of what had already been announced by Occidental CEO Ray Irani in the January 15, 1991 issue of the Wall Street Journal. *See also, The Oil Daily,* January 15, 1991. A quick comparison of the comments made in this article with what was ultimately resolved by the Board as part of the settlement of the instant action reveals the flaw in Professor Scott's assertion. Tullman Decl. Exhibit D at 079-82. The January 15, 1991 article merely announced (1) that the dividend to stockholders of Occidental had been lowered to $1 per annum, (2) that Occidental would utilize a completely discretionary "rule of thumb" dividend payout of 50% of earnings for an indeterminate amount of time, and (3) that dividends *might* not rise until after earnings exceeded $2 per share. This article did not specify the duration of these policies or commit Occidental to following these policies under any particular set of economic circumstances. More importantly, as Professor Scott points out, under a completely unrestrained application of Delaware's business judgment rule, the officers and/or the Board of Occidental were free to alter these "policies" on a virtual at-will basis without any explanation whatsoever as long as the decision did not constitute a fraudulent abuse of discretion under Delaware law. *See Baron v. Allied Artists Pictures Corp.,* 337 A.2d 653 (Del.

1975); *Eshleman v. Keenan*, 194 A. 40 (Del. 1937), *aff'd*, 2 A.2d 904 (1938).

In contrast to the above-referenced laissez faire set of circumstances, the dividend policy subsequently ratified in December of 1992 (Settlement Agreement at 11-12) was both definite and precise as to both the time period and a formula under which dividends were to be paid. It established 1) a base dividend of $1 per share per annum through 1997; 2) a definite policy extending through 1997 whereby shareholders could expect a rise in dividends to 50% of earnings per annum contingent upon a finding that earnings exceeded $2 per share per annum; and 3) a "floor" whereby if the earnings sank below $2 per share per annum, Occidental would pay out as dividends a minimum of 60% of whatever earnings had been achieved for the applicable time period. Indeed, as is acknowledged in the Settlement Agreement, these precise and consistent policies *were implemented at least in part because of Class counsel's efforts*. In light of the obstacles to recovery described above, and in light of the statements concerning Occidental's dividend which prompted this Litigation, the Settlement approved by the Court is an outstanding result which is designed to and does redress the very matter which gave rise to the Complaint, *i.e.* the cut in Occidental's dividend and the resultant uncertainty about prospective dividends. Pursuant to the Stipulation, Occidental's Board of Directors agreed to adopt and has adopted and implemented a dividend policy which provides for Occidental (1) to maintain the annual dividend on Occidental's common stock at no less than $1.00 per share through 1997, (2) to pay an annual dividend on the common stock at a rate of 50% of Occidental's recurring

and sustainable earnings if such earnings exceed $2.00 per share per annum and to maintain that policy through at least 1997; and (3) if recurring earnings on a sustainable basis do not exceed $2.00 per share in 1993, 1994 or 1995, the rate in the dividend policy set forth above will be increased to 60% of recurring earnings on a sustainable basis in 1996 and 1997. In addition, the Stipulation provides that the declaration of future dividends under this dividend policy will be subject to the Board's exercise of its fiduciary obligations and business judgment, as well as all applicable laws and financing restrictions or limitations.[4] All of these terms, including these highly detailed provisions, are directly attributable to plaintiffs' efforts in prosecuting, negotiating and settling this Litigation. Plaintiffs are not aware of any other public corporation which has adopted this or a similar policy. Moreover, defendants, in their March 22, 1993 submission, point out that "[t]he terms of the proposed settlement responds significantly to the concerns expressed in plaintiffs Complaint. . . . " and that "[d]efendants believe that the dividend policy implemented by Occidental provides a valuable benefit to the class." *See* Defendants' Memorandum in Support of Settlement at p. 12, filed with this Court on March 22, 1993. Therefore, unless Professor

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[4] Notwithstanding this provision, the terms of the Settlement were entered into in good faith and are binding on the parties. Moreover, defendants have lived up to the terms of the Settlement to this date (i.e. the dividend policy). In fact, since the Settlement has been entered into between the parties, defendants, pursuant to the dividend policy provided for in the Stipulation, have made approximately $900 million in dividend payments.

Scott can somehow qualify himself as a certified economic clairvoyant and prove to the satisfaction of the Court that but for the instant legal action Occidental's Board would have continued a payout of $1 per year, it is submitted that Professor Scott's argument is purely speculative and unpersuasive.

Professor Scott's "fall back" position is that the inclusion of the business judgment rule within the Settlement is essentially a capitulation of any and all rights previously enumerated within the agreement. Apparently, he believes that the granting of *any* latitude to the Occidental's directors to deviate from the above-referenced dividend formula renders the agreement of nugatory value. This view is both legally inaccurate and not in comportment with "real life" business practices. Under Professor Scott's presumptive formulation of an "acceptable" settlement stipulation, the parties would be required to draft in "iron clad" terms which would provide Occidental's Board absolutely no discretion that might touch or concern Occidental's dividend policy. Such a "solution" is impractical, unfeasible, unrealistic and not in the best interests of the Class because it fails to acknowledge the complex business realities that may confront a board over a five year period. Attempting to draft a stipulation settlement that would embody every potential contingency over a protracted period of time could have factually deterred the parties from ever reaching an accord. *See* Burton, *Breach of Contract and the Common Lake Duty to Perform In Good Faith*, 94 Harvard L. Rev. 369 (1980). Moreover, such a request might, in and of itself, prove illegal as directors are forbidden to "delegate" their core corporate responsibilities – especially as they relate to the

setting of dividends. *See Adams v. Clearance Corp.*, 121 A.2d 302 (Del. 1956); *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985); Del. Corp. Code Section 141(c).

On a different level of analysis, it is equally apparent that although plaintiffs did provide an option for Occidental to change the terms of their dividend policy, Professor Scott is incorrect in stating that Occidental's Board's discretion under the Settlement is both unlimited and unchecked. Obj. Mem. Exhibit A at 5. It is a recognized rule of law that judgments – especially stipulated or consent judgments – should be construed and treated as a form of contract. *Owsiejko v. American Hardware Corp*, 75 A.2d 404 (Conn. 1950; *Meyer v. Brooks*, 44 P. 281 (D. Or. 1896). It follows that under Delaware law (which controls the construction of this Settlement), that the Settlement and Occidental's right to invoke the business judgment rule as a rationale for changing its dividend policy is circumscribed by an implied covenant of good faith and fair dealing. *Voege v. American Sumatra Tobacco Corporation*, 241 F. Supp. 369, 375 (D. Del. 1965); *Cravero v. Holleger*, 566 A.2d 8, 18 (Del. 1989); *Weisman v. M.C.A. Inc.*, 45 F.R.D. 258, 264 (D. Del. 1968). Thus, even when a contract like the one at issue provides one party with express discretionary powers, this right is not unlimited to the extent that the party exercising the discretion must still act in good faith and forebear upon "overreaching" and acting in a manner so as to simply "recapture" an opportunity originally dispensed with in the original contract. *See Coca-Cola Bottling Co. v. Coca-Cola Co.*, 668 F. Supp. 906 (D. Del. 1987). *Neumiller Farms, Inc. v. Cornett*, 368 So. 2d 272 (Ala. 1979); *Maas v. Scoboda*, 188 Neb. 189,

195 N.W.2d 491 (1972). Accordingly, contrary to the assertions of Professor Scott, the Settlement has provided the Class with a heightened degree of security relative to their expectations of dividend returns.

Equally important, Class counsel has also provided the Class with a valuable procedural right. As embodied in both the Settlement and the order approving the Settlement, the Court has retained jurisdiction to enforce the rights and terms of the Settlement. On this basis, in the event that the Occidental Board deviates from the subject dividend policy, the Class can move forward in an expeditious manner with a citation for civil contempt under Federal Rules of Civil Procedure 69 and 70. Absent this retention of jurisdiction, the Class would have to file a separate complaint and await the lengthy process of fighting numerous motions to dismiss before ever having a right to call witnesses or undertake meaningful discovery relative to the "bad faith" issue. *See* 17 U.S.A.C. 77z-1(b). Therefore, it is also obvious that Professor Scott has ignored the fact that Class counsel has also provided the Class with the crucial right of direct and immediate judicial intervention in the event that a disagreement arises as to the terms and implementation of the Settlement.

V. The Agreed-To Fees Negotiated by Judge Irving And Awarded To Class Counsel Are Supported By Well Established Principles Of Law In This Circuit And District

A. The Agreed-To Fee and Expense Amount Should Be Approved

The Court should affirm as fair and reasonable its previously approved attorneys' fees and expenses. This amount was agreed to by the parties after extensive negotiations before Judge Irving. The United States Supreme Court has indicated that consensual resolution of attorneys' fee issues is the *ideal* toward which litigants should strive. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court stated that "[a] request for attorney's fees should not result in a second major litigation. *Ideally, of course, litigants will settle the amount of a fee*" *Id.* at 437 (Emphasis supplied). *Accord In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 568-70 (7th Cir. 1992) (market factors, best known by the negotiating parties themselves, should determine the quantum of attorneys' fee). *See also*, 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 13.52, at 13-130 (3d ed. 1992) ("[c]ounsel . . . may, of course, seek to negotiate fees with the defendants . . . ").[5]

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[5] In representative cases, it is widely recognized that fee agreements between plaintiffs and defendants are encouraged. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974) ("[i]n cases of this kind, we encourage counsel on both sides to utilize their best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorney's fees").

In *In re First Capital Holdings Corporation Financial Prod. Sec. Litigation*, 1992 U.S. Dist. LEXIS 14337 (C.D. Cal. 1992), *amended*, 33 F.3d 29 (9th Cir. 1994), a case very similar to the present action in which Mr. Schonbrun objected to the settlement and the attorneys' fees, this Court held that absent any evidence of self-dealing or disabling conflict a negotiated fee should be approved.[6] (*See* Tullman Decl. Exhibit E) Specifically, the Court stated:

> Furthermore, the parties negotiated the Plaintiff's class attorneys' fees after all other provisions of the Settlement Agreement had been negotiated and decided upon in full. Judge Irving presided over these negotiations as he had done in previous negotiations concerning the Settlement Agreement. He approved the entire Settlement Agreement, including the attorneys' fee provision. Thus, there is no evidence that

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[6] The Settlement in this action is analogous to the settlement in *First Capital Holdings*. In *First Capital Holdings*, while the settlement included the creation of a $3.0 million settlement fund which was to benefit two distinct classes, the primary settlement consideration included a guarantee that FCL policyholders would receive 100 percent of death benefits and annuity payments and a guarantee the FCL policyholders would receive at least 100 percent of the account values of their policies, less the full amount of any outstanding policy loans and unpaid interest. *The settlement further provided that the defendants would pay $8,000,000 to plaintiffs' class counsel for fees and expenses.* As with the present case, the payment of the attorneys' fees in *First Capital Holdings, was not being paid out of any common fund which would have detracted or diminished the benefits to the Class.* Thus, outside of the $3.0 million, all the benefits obtained were to be conferred on the class in the future. *Id.* at *12-13.

> Plaintiffs' class counsel sacrificed their clients' interest to achieve some advantage for themselves. There was no conflict of interests and no self-dealing. The fee was negotiated at arm's length with the sophisticated defendants by the attorneys who were intimately familiar with the case, the risks, the amount and value of their time, and the nature of the result obtained for the class. Where there is such arm's length negotiation and there is no evidence of self-dealing or disabling conflict of interest, the Court is reluctant to interpose its judgment as to the amount of attorneys' fees in the place of the amount negotiated by the adversarial parties in the litigation. Therefore, the Court approves of the $8,000,000 in attorneys' fees awarded to Plaintiffs' class counsel. *Id.* at * 12-13.

The attorneys' fees awarded to Class counsel in this case were the result of extensive arms-length negotiations with the defendants only after the provisions of the Settlement were reached. The attorneys' fees were also negotiated with the assistance of Judge Irving who was well informed as to the terms of the Settlement, the claims alleged in the action, the defenses raised by the defendants, the risks confronted by Class counsel and the work that was done in the action on behalf of the Class. In addition, there has been no evidence of self-dealing or that Class counsel suffered from a disabling conflict of interest. In fact, both Objector and Objector's counsel have testified that they have no reasons to believe that agreed-to attorneys' fees were the result of non-arms length negotiations or that any collusion between the parties took place. Tullman Decl. Exhibits A at 015 and B at 061, respectively.

Moreover, in shareholder cases, where the corporate benefits are often difficult to quantify *precisely*, the agreed-to-approach to attorneys' fees is particularly appropriate. In *In re MDC Holdings Sec. Litig.*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95, 474 (S.D. Cal. 1990), the court approved a $3 million fee as part of the settlement of a shareholder derivative case, noting:

> Plaintiffs' counsel are not, on the derivative settlement here, seeking an award of fees out of the recovery – what is commonly called a "common fund" situation. Also, they are not seeking an award of fees against a defendant or the corporate beneficiary over its opposition. Derivative counsel have sought approval of an overall derivative settlement *which includes* as part of the negotiated settlement an agreed-upon fee payable by MDC from funds obtained by it from the insurance carrier for its officers and directors in recognition of the cash recovery and other substantial benefits which have been conferred upon MDC by reason of that settlement. MDC was separately represented by independent and very competent counsel throughout this case, including the negotiations which culminated in the settlement. This Court has already indicated its approval of the derivative settlement. *Id.* at 97,487.

See also, First Capital Holdings, 1992 U.S. Dist LEXIS 14337.

Contrary to Objector's counsel's argument that the attorneys' fees in the *MDC Holdings* case was paid out of the recovery to the class, it is clear from the court's holding that the agreed-to fees in that case were not being sought from either the common fund or an award against the defendants or corporate beneficiaries. Similar to the

MDC Holdings litigation, the fees previously approved in this case were the product of arms-length negotiations between the parties.

Based upon these and other facts stated below, the Court should affirm its previous approval of the agreed-to fee and expense award.

B. The Fees and Expenses Are Justified Under The "Substantial Benefit" Doctrine

The fees sought by Class counsel are also reasonable when analyzed under the "substantial benefit" doctrine, which permits an award of fees where the efforts of Class counsel produce a substantial benefit. Courts of equity have long permitted the trustee of a fund, or a party preserving or recovering a fund for the benefit of others, to recover his costs, including reasonable attorneys' fees, from the fund itself or from those enjoying the benefit conferred. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *Paul Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This exercise of equitable jurisdiction was initially labeled the "common fund" theory.[7]

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[7] This doctrine is broadly construed and applies whenever a litigant's activities create or preserve a commonly shared fund with a sufficiently identifiable class of beneficiaries and where the benefits are accurately traceable so that a degree of exactitude exists in shifting the benefits to those who have been benefitted. *See In re Petition of Hill*, 775 F.2d 1037, 1041 (9th Cir. 1985); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d at 271.

As a variation of the common fund doctrine, courts have developed the "substantial benefit" theory, which recognizes that an award of attorneys' fees is appropriate when a party, proceeding in a representative capacity, obtains a result which creates a "substantial benefit" of a pecuniary or non-pecuniary nature. *Serrano v. Priest*, 20 Cal. 3d 25, 38 (1977).

The substantial benefit theory is well recognized by the Ninth Circuit. As stated by the Ninth Circuit in *United States v. Imperial Irrigation District*, 595 F.2d 525, 529 (9th Cir. 1979):

> The "substantial benefits" exception to the traditional rule disfavoring awards shifting legal fees is well recognized, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S. Ct. 616, 24 L.Ed. 2d 593 (1970) . . . The justification for this exception is that identifiable persons who benefit substantially from action of the party seeking fees should share the costs. "To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Mills*, 396 U.S. at 392, 90 S. Ct. at 625. *See also Hall v. Cole*, 412 U.S. 1, 5-6, 93 S. Ct. 1943, 36 L.Ed. 2d 702 (1973).

Id. at 529.

The common fund doctrine is applicable not only to suits where the litigant actually creates or discovers a new fund of money, but also where he or she compels the distribution of a fund created by others or preserves an existing fund. *See First Capital Holdings*, 1992 U.S. Dist LEXIS 14337; *Lafferty v. Humphrey*, 248 F.2d 82, 84-85 (D.C. Cir.), *cert. denied*, 355 U.S. 869 (1957); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 166-67 (1939).

The attorneys' fees sought here are consistent with these decisions. The benefit conferred on Occidental's shareholders is readily quantifiable and clearly substantial. As noted above, since the resolution of this litigation, Occidental has distributed to its shareholders $1.4 billion in dividend payments and the market value of those shares has increased dramatically as demonstrated by the rise in Occidental's stock price within a short period of time after the Settlement had been achieved. Plaintiffs' experts have opined that the Settlement, at a minimum, has a value of $87.0 million, and realistically much more. As a percentage of this benefit, the previously awarded fees were very reasonable. Moreover, since the award will be paid by persons other than the beneficiaries, the benefit to redeeming shareholders is even greater. In short, the substantial benefit theory also justifies the fee and expense request of Class counsel in this case.

C. Class Counsel's Attorneys' Fees and Expenses Are Justified Under The Percentage Approach

Objector's counsel has challenged Class counsel's fee award by arguing that percentage approach *alone* is an improper method of justifying the awarded attorneys' fees.[8] According to Objector's counsel, "class counsel is

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[8] In direct contrast to Objector's counsel's current arguments that the Court should not have awarded the fee without a lodestar "cross-check" (Obj. Mem. at 8), Objector's counsel during his deposition acknowledged that there was nothing improper about the Court's decision to award Class counsel's fees without a lodestar cross-check. Specifically, Objector's counsel stated, "[n]o. I would say I don't believe the

improperly steering this Court towards the percentage approach for the reasons of personal, financial self-interest." Obj. Mem. at 7. Again, Objector's counsel has distorted the legal principles and facts surrounding Class counsel's request for attorneys' fees. It is clear from Objector's counsel's papers that Objector's counsel is much more concerned with lobbying against the use of the percentage approach in these types of cases, rather than discussing the specific facts of this case. According to Objector's counsel, "[t]he percentage approach is notorious for overcompensating lawyers" Obj. Mem. at 7. As discussed in Pltffs' Mem., the percentage approach is an acceptable method in this Circuit and District for determining the reasonableness of the requested attorneys' fees in these types of cases.[9]

In fact, Objector's counsel's argument that even if the Court were to find that this matter was one involving a "common fund", that the "percentage of fund" mode of reviewing the attorneys' fees should not be employed in lieu of a "loadstar" analysis was already explicitly rejected by another court within this circuit. Obj. Mem. at 8-10. In the recent decision of *In Re Sears Automotive Center Consumer Litigation*, (N.D. Cal. January 31, 1997) Docket No. C-92-2227-RHS-FMS (JSB) (Tullman Decl.

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court's required to use the lodestar approach." Tullman Decl. Ex. B at 055-56.

[9] Although plaintiffs' counsel argue that the percentage method is the preferred approach in this District and other district courts within this Circuit, contrary to Objector's counsel's remarks, nowhere did plaintiffs' counsel allege that the Ninth Circuit favors the percentage approach over the lodestar approach. Obj. Mem. at 9.

Exhibit F), the district court reviewed a settlement of a class consumer claim which entailed the defendant's distribution of "claim certificates" totaling $25,785,000.00 which could *potentially* be redeemed at the defendant's stores. Additionally, class counsel independently negotiated the payment of $3 million in attorneys' fees and costs which were to be paid separately from the "claim certificates". During the period between the actual settlement and a hearing on one of Mr. Schonbrun's typical "objector" intervention motions, over $25,579,100 (or over 99.2%) of the "claim certificates" were actually redeemed. In its ruling, the court held that the settlement constituted a "common fund." Thereafter, in determining the reasonableness of plaintiffs' counsel's fee application, the court reviewed four factors to evaluate the reasonableness of a "percentage of fund" approach, and ruled that each of these factors had been met favorably by class counsel in a settlement which was no more than 12% of the total relief afforded to the plaintiff class.

First, the *Sears* court considered the risks involved in the litigation. In upholding the award of attorneys' fees, the court found that "(t)he risk was considerable due to the difficulty which would have arisen in proving liability and damages for a large number of plaintiffs against a vigorous defense." *Id.* at 089. In the instant case, a review of the Court's file reveals that Occidental mounted a vigorous defense, opposing the underlying complaint as well as plaintiff's motion for class certification. Moreover, there remained real and substantial issues as to whether plaintiffs would have been able to prove their claim that the statements attributed to officials

within Occidental were substantively and knowingly misleading.

Second, the *Sears* court found that class counsel's representation had been "effective" to the extent that the settlement was reached after complex, arms-length negotiations and resulted in a unitary nationwide settlement with a major national corporation. *Id.* at 089-90. The facts in the instant case are similar to the extent that Class counsel obtained a nationwide settlement against an internationally renowned oil company after protracted bargaining under the supervision of Judge Irving.

Third, the *Sears* court evaluated the settlement and found that it was "just" in light of the fact that over $25,000,000 had already been "distributed" to the class under the terms of the agreement as well as the fact that the settlement provided the plaintiff class a heightened right to monitor and enforce their rights against Sears. *Id.* at 090. In the instant case, $1.4 billion has already passed from Occidental to their shareholders pursuant to the terms of the Settlement Agreement. Additionally, as is explained above, the Class now has the significant right to move for immediate Court review through contempt proceedings should Occidental breach the terms of the Settlement.

Finally, the *Sears* court considered the length of the litigation and found that although the parties had been involved in actual litigation a mere *three months*, the time spent within the suit made it possible for the class members to achieve a speedy and fair resolution. *Id.* at 090-91. In the instant case, Class counsel spent *nearly three years*

litigating the underlying suit and managed to obtain extraordinary result for the Class.

Based upon all of these factors, it is submitted that the previously awarded attorneys' fees falls well within the standards set by this and other courts in evaluating percentage of fund settlements.

As stated above, the awarded attorneys' fees in this case were the result of numerous arms-length negotiations between the parties with the assistance of Judge Irving. To demonstrate the reasonableness of Class counsel's fee request, Class counsel submitted to this Court a wealth of cases which utilized a percentage approach in determining the reasonableness of the requested attorneys' fees. Pltffs' Mem. at 19. Those cases support Class counsel's argument that the fees agreed to in this case and previously awarded by this Court were reasonable. In fact, Objector testified that he would not have objected to the attorneys' fees if the Settlement was deemed to have a value of $10.0 million and certainly not at a value of $87.0 million.[10] *See* Tullman Decl., Exhibit A at 015.

Nevertheless, Class counsel submit that this case is analogous to common fund cases. As support, Class counsel refers the Court to the Third Circuit's recent opinion in the *General Motors Litigation*. The Third Circuit in *In re General Motors Litigation*, 55 F.3d 768 (3rd Cir.),

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[10] Even if the Court were to utilize the lowest valuation of the Settlement ($87.0 million), the agreed-to fees would represent a payment of *less than 5% of the Settlement.*

cert. denied, 116 S. Ct. 88 (1995), applied a form of common fund analysis to a case in which the proposed "payout" was *more speculative than the one involved in the instant case.* The *General Motors* decision evolved from the myriad claims stemming from the well-reported controversy surrounding the safety of side-mounted gas tanks on several models of GM pick up trucks. After *nine months* of litigation, the parties reached a proposed settlement which, like resolution in the above-referenced *Sears* litigation, entailed the distribution of "rebate certificates" for the future purchase of other GM vehicles in addition to a "side" agreement by GM to pay class counsel's attorneys from *funds separate and apart* from any other monies involved in the settlement. In its opinion, the Third Circuit analyzed the propriety of the separate attorneys' fees agreement as follows:

> Courts have relied on "common fund" principals and the inherent management powers of the court to award fees to lead counsel in cases that do not actually generate a common fund. (Citations omitted). The rationale behind the percentage of recovery method also applies to situations where, although the parties claim that the fee and settlement are independent, *they actually come from the same source.*
>
> We believe that this case presents a situation more closely aligned with the common fund paradigm than the statutory fee paradigm. . . . Certainly, the court may select the lodestar method in some non-statutory fee cases where it can calculate the relevant parameters (hours expended and hour rate) more easily than it can determine a suitable percentage to award. But

> the court must vigilantly guard against the lodestar's potential to exacerbate the misalignment of the attorney's and the class's interests.
>
> In this case, the fee clearly was not made pursuant to a statute, therefore no legislative endorsed policy favors assuring counsel an adequate fee. And the settlement, though difficult to value, did not award the even more hard-to-value intangible rights that could in some limited circumstances justify using the lodestar method. In sum, *although this case presents a hybrid, we believe that it more closely resembles a common fund case.*

Id. at 821-822. (Emphasis added).

Like the *GM* decision, the instant case involves somewhat of a "hybrid" situation to the extent that not all of the Class's monetary benefits have already "vested" through a payout of dividends. Moreover, like the *General Motors* decision, the present case involves an assessment of attorneys' fees negotiated both separate and apart from the actual and potential payout of monies to the Class. Finally, it should also be pointed out that the instant case is similar to the situation encountered in *Sears* to the extent that approximately 90% of the payout has already occurred. On this basis, it is submitted that the instant litigation falls well within the purview of decisional authority advocating the utilization of a common fund approach to determine the reasonableness of Class counsel's fees.

The efforts of Class counsel have helped assure Occidental shareholders that Occidental will continue to pay

its dividends and in fact, potentially increase those dividend payments subject to the terms of the Settlement. Furthermore, the Settlement achieved for the Class provides not only a "safety net" for those shares, but has resulted in a significant increase in the market value of Occidental shares. The common fund doctrine is applicable not only to suits where the litigant actually creates or discovers a new fund of money, but also where he or she compels the distribution of a fund created by others or preserves an existing fund. *See Lafferty v. Humphrey,* 248 F.2d 82, 84-85 (D.C. Cir.), *cert. denied,* 355 U.S. 869 (1957); *Sprague v. Ticonic National Bank,* 307 U.S. 161, 166-67 (1939). Class counsel's efforts were a crucial part in preserving and enhancing Occidental's dividend policy for at least a period of five years. Thus, based upon these well recognized legal principles and Objector's counsel's own admission that it was not improper for this Court to award Class counsel their attorneys' fees without a lodestar cross-check, Class counsel's previously awarded fees are justified.

D. The Previously Awarded Attorneys' Fees and Expenses Are Justified Under the Lodestar/Multiplier Analysis

The attorneys' fees that were previously awarded by this Court are justified under the Lodestar/Multiplier analysis. A multiplier of 2.13 is reasonable and warranted as a result of the following: (1) the many hours of hard work that Class counsel devoted to this action; (2) the quality of work done by Class counsel and the success achieved during the course of the litigation; (3) the substantial benefit conferred on the Class; (4) the fact that the

issues confronting Class counsel regarding liability and damages were very complex; (5) that fact that Class counsel undertook this litigation on a wholly contingent basis, thus risking that they would neither receive any compensation or recoup any of the substantial money invested in this case if defendants were victorious; (6) the fact that Class counsel are highly experienced in shareholder class action litigation and have had an excellent reputation in the field for many years, and (7) that the fees previously approved by this Court fall well within the customary fees that have been approved by this District and other courts in this Circuit for these types of cases. *See,* Pltffs' Mem. at 22-30.

The arguments that have been raised by Objector's counsel are based upon empty attacks on the amount of Class counsel's lodestar, the way Class counsel litigated this action and Objector's counsel's reliance on radical legal propositions that are not indicative of prevailing law in this Circuit or District. Objector's counsel's primary argument is that the use of a multiplier is unjustified in a "fee shifting" case.[11] Obj. Mem. at 8-9. To support this proposition, Objector's counsel cites *Edelman v. PSI Associates II, Inc.,* 147 F.R.D. 217 (C.D. Cal. 1993). Yet, the holding in *Edelman* was very narrow and does not hold that it is improper to use a multiplier in all "fee shifting" cases. The *Edelman,* case involved a securities fraud action which had settled on terms which appear to

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[11] This case is not a "fee shifting" case. The attorneys' fees agreed to were the result of negotiations between the parties with the assistance of Judge Irving and not by an award of attorneys' fees against the defendants pursuant to a statute.

be limited to a "restructuring" of partnership rights as well as an agreement by the defendants to pay the class counsel's attorneys' fees as they were to be determined by the Court. *The same defendants who had bargained with the plaintiff class then objected to the fees submitted to the Court by class counsel, claiming that they were excessive and far beyond the parameters of the settlement agreement. Id.* at 223. After taking into consideration the nature of the settlement, the court refused to apply a multiplier to class counsel's initial lodestar fee. This decision was predicated upon two distinct reasons. First, the Court made a factual determination that the settlement did not "substantially benefit" the class since any future "benefit" accruing from the stipulated alteration of partnership rights was completely speculative. *Id.* at 222. The Court felt that since there was no immediately apparent financial benefit to the class, the settlement amounted to a non-statutory "fee shifting agreement." *Id.* at 220. On this basis, and relying [on] *City of Burlington v. Dague*, 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed. 2d 449 (1992), (a case which had ruled against the use of multipliers in cases in which fee shifting was *mandated by statute* and there was no "common fund" accruing to the class), the *Edelman* Court utilized an analogy in reasoning that non-statutory "fee shifting" cases where there was no "common fund" should also be treated in the same manner. *Id.* at 219-20. The Court also ruled against a multiplier enhancement due to the fact that due to prior litigation against the defendants, "it was virtually a foregone conclusion [that] the matter could be resolved by settlement, and that the [Plaintiff's] firm would not be required to earn its fee by prevailing at trial." *Id.* at 221.

The instant case is distinguishable from *Edelman* in several critical areas. Unlike *Edelman*, this was a hotly contested litigation, with no hint whatsoever that there would be a settlement or recovery of any attorneys' fees. Furthermore, this extraordinary Settlement was achieved by Class counsel while facing very serious issues concerning liability and damages. In fact, the extraordinary complexity of this action is irrefutable. Objector's counsel, in his own papers, acknowledged that "Class counsel should be awarded a fee which will refocus their 'mindfulness' and discourage them from embarking on litigation where liability and damages present serious questions of recovery to class members." Obj. Mem. at 20. Furthermore, the Settlement or attorneys' fees in this case *were not contested by the actual parties to the agreement.* Likewise, the amount of attorneys' fees was reached through arms-length negotiations between the parties, and the amount of the attorneys' fees was arrived at with Judge Irving's assistance only after the issue of the relief provided to the plaintiff Class had been resolved by the parties. Therefore, as previously cited, the instant case is distinguishable from *Edelman* and instead analogous to *First Capital Holdings*, in which the Court rejected the complaints of an objector (who was also represented by Mr. Schonbrun) and approved a settlement containing elements of a "future benefit to the plaintiff" with a separate payout for attorneys' fees. This decision was predicated upon the fact that the settlement referee (once again, Judge Irving) had negotiated the substantive settlement for the Class before reaching an agreement as to attorneys' fees. *First Capital Holdings*, 1992 U.S. Dist. Lexis 14337. Since the instant case is far closer to *First Capital*

Holdings, rather than to the situation encountered in *Edelman*, it is and should be considered the better authority.

In addition, unlike *Edelman*, the plaintiff Class in the instant controversy has *already* received substantial benefits both on a substantive and procedural level of analysis. Whereas the *Edelman* Court faced a decision in which the value of settlement rights of the plaintiff class remained virtually entirely speculative at the time of the Court's ruling, *Edelman*, 147 F.R.D. at 222, the Class in the instant controversy has already received $1.4 billion in dividends as well as a safetynet and substantial increase in the value of their Occidental shares. Further, the instant case did not ride on the coattails of any other litigation, was hotly contested from its inception by experienced counsel, contained virtually no guarantee of success, required the expenditure of a considerable number of man hours and money and involved novel and complex legal issues, as witnessed by the briefs filed by the parties in connection with Occidental's motion to dismiss.

Even if one was to assume that the instant case involves standard "fee shifting", the use of multipliers is not per se prohibited even where the benefit to a class may be speculative or non-financial. *See Guam Soc. Of Obstetricians & Gynecologists v. ADA*, 100 F.3d 691 (9th Cir. 1996). Even the *Edalman* Court stated that multipliers may still be used to enhance an award where a case is "unattractive" from a plaintiff's point of view, *Edelman*, 147 F.R.D. at 220, or if the efforts of counsel have met with "exceptional success". *Id.*; *See also Grant v. Martinez*, 973 F.2d 96 (2nd Cir. 1992); *Hensley v. Eckerhart*, 461 U.S. 424,

434, 103 S.Ct. 1933, 1040-1, 76 L.Ed.2d 40 (1983). Furthermore, while the mere "contingent" nature of a case cannot form an independent basis for utilizing a multiplier, *Shipes v. Trinity Industries*, 987 F.2d 311, 322-23 (5th Cir.), *cert. denied*, 510 U.S. 991 (1993), if a case contains complex issues or is especially labor intensive, a multiplier may still be utilized to enhance an award. *Valazquez Hernandez v. Morales*, 810 F. Supp. 25, 28 (D.P.R. 1992), citing *Feliciano v. Colon*, 697 F. Supp. 51, 60-61 (D.P.R. 1988). On this basis, given the fact that the attorneys' fees previously approved by this Court is well within the normal range of enhancers utilized in such cases, (e.g. *Van Vraken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D. Cal. 1995)), the Objector's request for a reduction in attorneys' fees should be denied. Moreover, as stated above, Class counsel's hard work, while confronting great risks, has yielded an extraordinary settlement for the Class and thus clearly justifies the use of a multiplier.

Objector's counsel also argues that all of Class counsel's billings should be assessed at their "historical" rates as the litigation accrued as opposed to up-grading all of the hours expended in the case to "current" billing rates. The rationale for this argument is that their has been no proof submitted by Class counsel relative to intervening inflation since the initiation of the action. Obj. Mem. at 17. However, it should be pointed out that inflation is not the only basis for this adjustment practice. This Court recognizes that a "current rates" fee upgrade is also deemed acceptable because during the pendency of a case counsel may have also missed investment opportunities

as well as lost interest. *Gates v. Deukmejian*, 977 F.2d 1300, 1315 (9th cir. 1992).[12]

Recent case authority indicates that it is an abuse of discretion not to adjust a fee by "upgrading" past billings to current billing norms or make other reasonable adjustments when there is any significant delay in obtaining a settlement. *In Re Washington Public Power Supply Sys. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994); *Morgan v. Gittens*, 915 F. Supp. 457, 472 (D. Mass 1996). On this basis, Objector's counsel's novel "theory" should be rejected. Independent of the fact that Class counsel has been litigating this objection for over three years, Class counsel had devoted nearly three years to litigating this class action suit. Accordingly, it is proper for this Court to utilize current billing rates in its analysis.

Further, Objector's counsel argues that Class counsel's billing rates should be limited to conform with "local" norms. This assertion is based upon a single transcript of a California Superior Court hearing as well as a thinly veiled request for judicial notice of the "fact" that New York City charges are "the highest in the United States" Obj. Mem. at 12. As a purely legal proposition, this Court is not required to adopt local billing rates as a criteria under loadstar. See *Polk v. New York State Dept. Of Corr. Services*, 722 F. 2d 23, 25 (2d Cir. 1983) as cited in

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[12] Objector's counsel's reliance on *In Re Equity Funding Corp of America Sec. Litig*, 438 F. Supp. 1303 (C.D. Cal. 1977), is misplaced. *Equity Funding* merely stands for the proposition that courts can employ "historical" rates as a basis for lodestar when loss of use factors have already been utilized in arriving at a lodestar "multiplier" *Id.* at 1331.

Davis v. Mason County, 927 F.2d 1473, 1488 (9th Cir. 1991). This was a *nationwide* class action and as such it is proper for the Court to utilize the rates where the attorneys practice.

Objector's counsel also suggests that one option for the Court is to use "the hourly rates of counsel who typically represent defendants in securities class actions." Obj. Mem. at 13. This argument is unpersuasive. Defense firms are free to charge at lower rates than by plaintiff-oriented security firms *because they are guaranteed a recovery on virtually every case regardless of the result* of any particular suit and they are typically paid on an hourly basis with some type of retainer paid by the client before the litigation is commenced. In contrast, plaintiff-oriented security firms take on enormous risks every time they decide to represent a client and must therefore "spread the risk" of a negative result on any given case through the utilization of higher fees. Nevertheless, conscious of the fact that the Objector's counsel is essentially comparing "apples and oranges," Class counsel refers the Court to the billing rates of other plaintiff security firms to demonstrate that Class counsel's billing rates are reasonable. Tullman Decl. Exhibit G.[13] Upon comparison with the fees billed by these other firms, it is submitted that the instant billings submitted by the Class counsel are reasonable and are in comportment with what other consumer securities firms charge for their services.

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[13] *See also, Davitt v. United States District Court*, 1995 Lexis 5085 (N.D. Ill. 1995) and *The Lawyer's Almanac 1996*, Aspen Publishers, Inc.

Objector's counsel has also challenged Class counsel's lodestar by claiming that Class counsel's lodestar is the product of poorly delegated work and excessive time spent on tasks. Both of Objector's counsel's arguments are baseless.

With respect to Objector's counsel's argument that Class counsel's lodestar should be reduced as a result of "the total lack of delegation of work to attorneys of appropriate background and experience," Objector's counsel refers the Court to the fact that a high percentage of the work done in this litigation was done at senior partner rates. Obj. Mem. at 13. Unlike the cases cited by Objector's counsel, the law firms representing plaintiffs in this action were small in size and primarily made up of senior attorneys. In fact, Kevin Yourman, who is a senior partner and who did a substantial amount of work in this case was the sole attorney working for Weiss & Yourman in the Los Angeles office for much of the underlying litigation. Furthermore, for the most part, the other attorneys at Weiss & Yourman and Stull, Stull & Brody are senior attorneys who have extensive experience in litigating shareholder class action and derivative lawsuits. As such, the structure that was utilized by the *AOL* court and suggested by Objector's counsel is nether proper nor germane to the present case.[14] Obj. Mem. at 14. Class counsel submit that the great success that was achieved for the Class in this litigation was a direct result of the

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[14] Unlike the present case, the plaintiffs in the *AOL* litigation were represented by numerous law firms (nearly 20), many of which contain over 20 attorneys and significant paralegal support. Obj. Mem. Exhibit B.

fact that plaintiffs were represented by lawyers who had extensive experience in litigating these types of cases. Without such a commitment by Class counsel, the same successful result might not have been achieved.

Objector's counsel's argument that Class counsel's lodestar should be reduced as a result of excessive time spent on tasks should also fail. Obj. Mem. at 15. Citing two examples in which Objector's counsel believes that the time spent on those tasks were excessive, Objector's counsel contends that Class counsel's entire lodestar should be reduced by 25%.[15] *Id.* Objector's counsel's attacks are completely meritless and not based on any competent evidence. Class counsel submit that not only were the hours devoted by Class counsel to litigating this action necessary and reasonable, but that Objector's counsel is in no position to judge and criticize the reasonableness of class counsel's lodestar. As Objector's counsel testified, *Objector's counsel has never acted as counsel on behalf of a class of shareholders or as derivative counsel to prosecute a cause of action or negotiate a settlement involving alleged violations of the federal or state securities laws.*

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[15] With respect to the hours devoted to the particular tasks cited by Objector's counsel, Class counsel argue that the hours devoted to those tasks were necessary and reasonable. These tasks involved class certification of the action and defendants' motion to dismiss the action. Both of these issues are determinative and involve very complex issues of fact and law. Considering the level of experience of plaintiffs' adversaries, less time spent on these tasks could have significantly changed the outcome of the litigation. Furthermore, to suggest that plaintiffs' counsel spent too much time on these tasks is illogical because Class counsel were not retained to prosecute this litigation on an hourly basis.

Tullman Decl. Exhibit B at 029. Thus, for Objector's counsel to suggest that Class counsel's hours were excessive without having any first-hand experience in litigating these types of cases or any real evidentiary or expert support speaks volumes about the credibility of Objector's counsel's arguments.[16]

Finally, Objector's counsel's argument that Class counsel's fees should be reduced based on Class counsel's lack of success is uncompelling. In his efforts to reduce the previously awarded attorneys' fees, Objector's counsel has gone as far as to argue that Class counsel's lack of success in litigating the objection justifies a reduction of the attorneys' fees. Obj. Mem. at 16-17. While a court has the discretion to adjust a lodestar based on the success of litigation, the success factor relevant to any adjustment concerns the underlying litigation, not Objector's dispute. Additionally, nothing in the record supports Objector's counsel's conclusion that Class counsel has met with only limited success. To the contrary, Class counsel has achieved a very favorable settlement for the Class. The fairness of the Settlement was not only approved by the Court but also affirmed by the Ninth Circuit after briefing and oral argument. To the extent that the Ninth Circuit remanded the attorneys' fees issue back to the District Court, based upon procedural grounds, is no basis to diminish the great success that had been achieved by Class counsel on behalf of the Class. If anything, the

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[16] For the same reasons set forth herein, Objector's *unsupported* argument that a reduction is justified based on "vague descriptions" of work performed should also be overruled. Obj. Mem. at 17-18.

substantial benefit conferred on the Class warrants the lodestar multiplier proposed by Class counsel.

VI. Objector's Counsel's Improper Motives are Relevant to this Court's Evaluation of Objector's Objections

Class counsel contend that this Court should take into serious consideration Objector's counsel's improper motives when evaluating the merits of Objector's objections to the attorneys' fees previously awarded in this action. It is quite clear from the record developed in this litigation that Objector's counsel is using Mr. Kaufmann's investment in Occidental as an opportunity to advance his own financial and political agendas and not the interests of either Mr. Kaufmann or the plaintiff Class. Objector's counsel's methods should not be condoned by this Court.

As discussed above, the only entity involved in this dispute that stands to benefit from Objector's objection is *Objector's counsel*. The testimony elicited at Objector's deposition demonstrates that Objector does not have any expectation of obtaining any monetary or nonmonetary relief as a result of filing his objection. Tullman Decl. Exhibit A at 012. Likewise, Objector's counsel has made is quite clear that he only represents Mr. Kaufmann and not the rest of the Class. Thus, any reduction of the awarded attorneys' fees will have no beneficial impact on either

Objector or the Class. Yet, Objector's counsel certainly stands to benefit from his improper tactics.[17]

Moreover, Objector's counsel's improper motives are further unveiled by the fact that Objector's counsel offered to withdraw his client's objection in exchange for the payment of $250,000 to Objector's counsel or persons designated by him. This improper attempt to obtain a quarter of a million dollars from Class counsel occurred during a meeting between the parties at the home of Mr. Kaufmann in Berkeley, California. See Declaration of Joseph H. Weiss filed concurringly herewith. While Mr. Kaufmann and Mr. Schonbrun have acknowledged that the meeting took place, contrary to Judge Chapman's Order, they have both refused to testify concerning the substance of that meeting. Tullman Decl. Exhibits A at 013 and B at 051.

Objector's counsel's improper tactics were accurately described by Patrick Coughlin in a recent settlement hearing before the Honorable Charles A. Legge.

> Mr. Schonbrun is here. He is in a lot of cases coming in and objecting. . . . He has been involved in some of these class action cases, both securities and consumer. He knows what they are about. He doesn't want that heavy lifting or the risk. He [sic] rather wait until there is a pot of money and then come in and do a job that essentially the court has to do anyway. That's what he is asking. . . . Now I know there

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[17] Objector's counsel has informed this Court that his efforts as a watchdog of litigation abuse should be rewarded by an order awarding him payment of his attorney's fees. Tullman Decl. Exhibit B at 046.

> is money put up, let me come in and try to get a piece of that money. I have a client.
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> * * *
>
> What he's done to me in the past, as soon as the appeal is taken, when this is not quick pay or sometimes he come to me, asks me to – for a few thousands dollars to try – you know, will I pay that. And he withdraws his appeal.

See Tullman Decl. Exhibit H at 124-126.

In fact, Objector's counsel's improper tactics have drawn the serious attention of Judge Marilyn Hall Patel of the United States District Court for the Northern District of California. In the action of *Wolf, et al. v. Toyota Motor Sales, USA, Inc. et al.*, Case No. C-94-1377 MHP, Judge Patel entered an order to show cause concerning the "serious concerns about the conduct of attorney Schonbrun and representations before this court." See Tullman Decl. Exhibit I at 138. (Order To Show Cause And Order For Assignment Pursuant To Civ. L.R. 11-6(c) Attorney Disciplinary Proceedings, *In re Lawrence W. Schonbrun*, CV-96-0134-MISC-MMC (December 9, 1996)). After reviewing the testimony of Ms. Luna (an objector in the *Toyota* litigation and supposedly represented by Mr. Schonbrun), Judge Patel made the following findings:

> The deposition raises serious questions about Mr. Schonbrun's legal representation of Ms. Luna and whether she is, in fact, his client. It also raises serious questions about his representations to this court where he has purported to represent her for over a year before she says she met him. Attorney Schonbrun responds to the deposition of his "client" by proffering the changes Ms. Luna made in her deposition when

it was sent to her in the ordinary course of post-deposition review. However, these changes raise equally serious questions, since nearly every answer of critical importance to the inquiry has been changed. Even the question of how Ms. Luna received the deposition and made the changes is in dispute.

Additional allegations are made in the papers of plaintiffs' counsel about Mr. Schonbrun's conduct in other cases. None of these cases appear to have been in this District and this court is not prepared to act by reason of those allegations. However, the record before this court on this motion raises serious questions of ethical breaches on the part of Mr. Schonbrun including, but not limited to:

1) Misrepresenting that he is authorized to provide legal representation to Ms. Luna in this action and the facts of that representation;

2) Violations of Rule 3-200 of the California Rules of Professional Conduct ("Rules") in that it appears that he asserted a position in this litigation without probable cause and for the purpose of harassment;

3) Violations of Rule 5-200 of the Rules in that he has been untruthful with the court and with a judicial officer of the court, Judge Renfrew, and has sought to mislead them about his representation and its bona fide in this action;

4) Violations of Civil Local Rule 11-3(a)(2), (3) and (4) for the reasons set above.

Id. at 140-41.[18]

In addition to seeking to obtain financial gain from his client's objection, Objector's counsel is also using this dispute as a forum to make his typical arguments against awarding attorneys' fees in this type of litigation.[19] A review of Mr. Schonbrun's papers demonstrates that Objector's counsel is much more concerned with making his usual attacks on the way courts award attorneys' fees rather than seeking to redress any injuries suffered by his client. To put it simply, Mr. Schonbrun rarely has any true interests regarding the substance of a settlement, the work that was done in a case by Class counsel, the risks

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[18] The disciplinary proceeding concerning Mr. Schonbrun is currently before Judge Charles A. Legge of the United States District Court for the Northern District who has appointed an attorney not involved in the litigation to "conduct the necessary inquiry and present the prosecution of this disciplinary proceeding." See Tullman Decl. Exhibit I at 137. A hearing has been scheduled for May 30, 1997, before Judge Legge to consider the status and scheduling of further proceedings. *Id.*

[19] According to Objector's counsel, "[t]he instant case is simply another example of excessive attorneys' fees being requested through the creation of fictitious settlement values based upon the speculations of experts hired by plaintiff's lawyers." Obj. Mem. at 8. Likewise, Objector's counsel concluded his papers by stating, "Objector believes that this Court should acknowledge what legal scholars have been saying about the negative aspects of this type of litigation. Class counsel should be awarded a fee which will refocus their 'mindfulness' and discourage them from embarking on litigation where liability and damages present serious questions of recovery to class members." *Id.* at 20.

confronted by Class counsel in these types of cases or whether his client suffered any injuries. Instead, Mr. Schonbrun blindly alleges that the lawyers prosecuting class action suits make too much money.

This case is a perfect example of Mr. Schonbrun's practice, object first and ask questions later.[20] In fact, Objector's counsel admitted during his deposition that prior to filing his client's objections he (i) did not recall reviewing or retrieving the file in this action, (ii) had no recollection whether he reviewed the complaint filed by Class counsel, (iii) was not opposed to the case settling, (iv) did not have an opinion as to whether the litigation had merit, (v) did not have an opinion as to whether the Settlement had value and (vi) did not attempt to quantify either the value of the Settlement or the damages suffered by his client. Tullman Decl. Exhibit B at 037-39, 41, 45. Certainly, prior to filing their objections, Objector and his counsel were obligated to research the facts and circumstances of this case rather than blindly filing objections

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[20] At his deposition, Schronbrun clearly stated that "I don't see that what I did in 1993 is relevant to what we're discussing now in 1997." Tullman Decl. Exhibit B at 047. Moreover, Schonbrun went as far as to say that why Mr. Kaufmann filed his objection is irrelevant to this dispute. According to Schonbrun, "I don't think the Judge wants to know why Mr. Kaufmann – he's not concerned why Mr. Kaufmann did it. What is this expert saying?" *Id.* at 049. Clearly, why Mr. Kaufmann objected to the attorneys' fees goes to the very heart of this Court's evaluation of the merits of Mr. Kaufmann's objections. Somewhere, Objector's counsel had lost sight that this dispute is supposed to be based on his *client's* objections and not his *own*.

hoping that their objections will yield results when the smoke clears.

Objector's counsel's soapbox advocacy was recognized and commented upon by Justice J. Anthony Kline in the case of *McClendon v. Security Pacific National Bank*, A059120. During the final settlement hearing in that litigation, Schonbrun argued that "[s]ociety in general is sick of [class actions]. . . . They're sick of lawyers making all kinds of money at their expense. It's not a money making machine for lawyers. It's about justice." In response to Schonbrun's arguments against class counsel's fee application, Judge Kline remarked,"[w]ith all due respect, you didn't come in here to vindicate the integrity of the legal system . . . [y]ou came in here to vindicate the interest of your client." See Tullman Decl. Exhibit J at 143.

Similarly, at a final settlement hearing before Judge Legge where Mr. Schonbrun objected to the settlement and application for attorneys' fees and expenses by making various policy arguments against the amount of money class action lawyers are making, Judge Legge stated:

> I am going to overrule the objections that have been filed by Mr. Schonbrun on behalf of Mr. Teeters. A lot of the points you raised are valid policy considerations of is [sic] this the way that litigation should proceed, should there be class actions, if they are class actions, what should be the incentive trade-offs, what should be a proper method of compensation. But in this case, we don't ride on a clean slate. We have the experience of many, many class actions that have come before us, many of which are reported both in District Court and the Circuit

> Court opinions. And in this particular case, the track record of the case itself.

Tullman Decl. Exhibit H at 127.

As with many of Mr. Schonbrun's other cases, Mr. Schonbrun in this case is using the objections of his client as an opportunity to pursue his own financial and political interests. As evidenced by his papers, his arguments solely focus on the amount of money that the lawyers in this litigation are making. Objector's counsel completely ignores or discounts the merits of the litigation, the hard work that Class counsel devoted to this litigation, the risks that were confronted by Class counsel, including among other things that a defendants' victory would have met [sic] that Class counsel would not have received any fees and would have lost the substantial amount of money they had invested in this case, and the fact that the Settlement Agreement and fees were the result of numerous intense negotiations between the parties with the assistance of Judge Irving. Mr. Schonbrun has managed to delay final resolution of this case for over three years under the false pretense that he is seeking to protect the interests of his client. Yet, as discussed above, his true motives are transparent and improper and as such this Court should overrule his objections and deny him any attorneys' fees.

VII. Conclusion

Based on the foregoing reasons, Class counsel's previously awarded attorneys' fees should be approved, Objector's objections should be overruled in their entirely and Objector's counsel should be denied attorneys' fees.

Dated: May 2, 1997

Respectfully submitted,

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALBERT ZUCKER, et al., Plaintiffs, v. OCCIDENTAL PETROLEUM CORP., et al., Defendants.	CV 91-0214 JMI (RCx) **ORDER AWARDING ATTORNEYS' FEES** (Filed Jun. 4, 1997)

IT IS HEREBY ORDERED:

Plaintiff's Application for Attorneys' Fees in the amount of $2.975 million came before this Court on June 2, 1997. After careful review, considering all the arguments and materials presented by the parties, attorneys' fees are awarded in the amount of $1,151,527.80.

BACKGROUND

This is a class action for securities fraud. Plaintiffs brought this action against Defendants Occidental Petroleum Corp. ("Oxy"), Ray Irani ("Irani", the CEO of Oxy), and Howard Collins (spokesman of Oxy). Plaintiffs alleged that Defendants made material misrepresentations of fact, assuring the public that Oxy would maintain its traditional $2.50 per share annual dividend payment to shareholders.[1] Plaintiffs claim that they relied on

[1] Led by CEO Armand Hammer until his death in 1990, Oxy had traditionally made annual dividend payments of $2.50

Defendants' false and misleading misrepresentations to their detriment in that the market price that they paid for the Oxy securities had been falsely inflated.

The parties entered into a Settlement Agreement ("Agreement"), which this Court approved. In the Agreement, Oxy guaranteed to pay minimum $1 per share annual dividend up to 1997. Oxy also promised to make a fifty per cent payout of sustained earnings if that amount exceeded $2 per share. If the sustained earnings from 1993-95 amounted to less than $2 per share, the payout rate would be sixty per cent. All of these terms were subject to the Board's fiduciary obligations, business judgment, and its ability to enter into contract contractual agreements in any financing.

This Court also approved an award of $2.975 million in attorney fees. The Ninth Circuit affirmed this Court's approval of the settlement but reversed on the issue of fees, as this Court did not "articulate its reasons for concluding that the plaintiff class received a substantial benefit and that $2.975 million is an appropriate amount of fees to award." To satisfy the Ninth Circuit's mandate, this Court ordered Plaintiff's counsel ("Class counsel") to file a brief with the Court justifying its fees. This Court then allowed class member Walter Kauffman ("Objector")

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per share regardless of company earnings. When earnings could not sustain such a dividend (often they did not), assets had to be sold off to accommodate the payments. On January 14, 1991, Defendants announced a new policy in which dividend payouts would reflect fifty percent of earnings. That announcement triggered the instant litigation.

to file a response. Plaintiffs have filed a Reply Memorandum.

OBJECTOR'S STANDING

Class counsel first argues that Objector Kauffman does not have standing to challenge the proposed fee award. Article III of the United States Constitution requires that federal courts hear only cases and controversies before them. Accordingly, a party must have standing – an actual or threatened stake in the outcome of the controversy – to invoke federal judicial authority. *See Valley Forge Christian College v. Americans United for Separation of Church and States, Inc.*, 454 U.S. 464, 472 (1982). Such standing does not arise merely from one's status as a class member. To object to an award of attorneys' fees, the class member must be *aggrieved* by the proposed action. *In re First Capital Holdings Corp. Financial Prod. Sec. Litig.*, 33 F.3d 29, 30 (9th Cir. 1994).

This issue, however, appears to have already been decided by the Ninth Circuit. While not expressly addressing this issue on appeal, the Court of Appeals heard Objector's arguments and ruled in part in his favor. Therefore, the Ninth Circuit implicitly recognized Objector's standing to challenge Class Counsel's request for attorney's fees.

METHOD OF CALCULATION

Both Class counsel and Objector agree that the Ninth Circuit recognizes two methods for calculating attorneys'

fees – the Lodestar/Multiplier Method and the Percentage Method. *See In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291 (9th Cir. 1994). When using the Lodestar/Multiplier Method, a court "calculates the 'lodestar' by multiplying the reasonable hours expended by a reasonable hourly rate." *Id.* at 1291 n.2. "The court may then enhance the lodestar with a 'multiplier,' if necessary, to arrive at a reasonable fee." *Id.* In contrast, when using the Percentage Method the court "simply awards the attorneys a percentage of the fund sufficient to provide plaintiffs' attorneys with a reasonable fee." *Id.* In either case, the fee ultimately awarded need only be reasonable under the circumstances. *Id.* Class counsel has attempted to justify its application for fees under both methods.

Class counsel urge this Court to adopt the Percentage Method in awarding fees.[2] In support of this argument, counsel has submitted the declarations of two expert witnesses who conclude that the terms of the proposed settlement added "substantial value" to Oxy shares. In particular, Roger F. Murray, Professor Emeritus of Banking and Finance at Columbia University's Graduate School of Business, notes that Oxy share prices rose from

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[2] In cases where courts adopt the Percentage Method, the "benchmark" for fees is twenty-five per cent, which may be raised or lowered under appropriate circumstances. *See Torrisi v. Tuscon Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). In this case, however, Class counsel's request for $2.975 million in fees is just four per cent of the "estimated" benefit conferred upon the class.

approximately $17 to $20, a capital increase of $900 million.[3] Further, Patrick J. Sheehan, a financial analyst with thirty years of experience, concludes that the settlement achieved by Plaintiff's counsel amounts to between $87 million and $159 million in increased stock prices for members of the class.

In this case, however, it is inappropriate to award fees under the Percentage Method. First, no actual award of damages was created by this settlement. Therefore, there is no common fund from which a percentage can be drawn, making use of the Percentage Method impracticable. Second, while the credentials of experts Murray and Sheehan are impressive, their conclusions that the class received a "benefit" in the form of increased stock prices are speculative at best.[4] Not surprisingly, Objector was able to present two opinions from equally prominent experts asserting conclusions exactly opposite to those offered by Class counsel. Simply put, there is no direct evidence that execution of the Settlement Agreement *caused* the increase in stock prices. Therefore, this Court will use the Lodestar/Multiplier Method in calculating fees.

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[3] Professor Murray concedes that the rise in stock price is not solely attributable to the settlement, though he ultimately concludes that the Settlement Agreement was a "significant" factor in the increased price.

[4] Specifically, Mr. Sheehan concluded that shareholders received a benefit of between "approximately" $87 million and $159 million. This extraordinarily flexible estimate – a $72 million gap – speaks volumes on the speculative nature of the expert's conclusions.

MULTIPLIER

Class counsel, as part of its proposed award of attorneys' fees, requests that this Court adopt a multiplier of 2.13 to the Lodestar of $1,397,107.00, for a total award of $2.975 million. Multipliers are often imposed to reflect counsel's risk in taking on such protracted litigation or its deserved reward from the benefits it extracts for the class.

Objector cites to *City of Burlington v. Dague*, which proscribes the use of a multiplier in cases where the plaintiff prevails on a federal claim that mandates fee shifting. 505 U.S. 557 (1992). Objector also directs this Court to a case more directly on point, *Edelman v. PSI Assoc. II, Inc.*, 147 F.R.D. 217 (C.D. Cal. 1993) (Letts J.). In *Edelman*, a class action securities case, the parties entered into a settlement agreement which did not provide a "pool" of funds payable to the class. Instead, the benefit to the class, if any, was to be derived from a presumed increase in the stock price from the settlement. U.S. District Judge Letts concluded that, although settlement precluded the possibility of the existence of a "prevailing" party, the agreement itself was essentially a non-statutory fee-shifting arrangement. As such, *Dague* applied to the case, precluding use of a multiplier.

The same analysis applies here in spite of Class counsel's vigorous attempts to distinguish *Edelman*.[5] First, this litigation was no more hotly contested than *Edelman*, as both cases settled without a trial on the merits or a

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[5] The applicability of *Dague* and *Edelman* are key here, as multipliers are not necessarily proscribed in "common fund" cases. *See Washington Pub. Power*, 19 F.3d at 1299.

summary judgment motion. Second, the benefit allegedly conferred upon the class members in this case is still similarly questionable to that presumed in *Edelman*, as Class counsel has in this case failed to show that the increase in share value was *caused* by execution of the Settlement Agreement. Third, it is irrelevant that the defendants opposed the attorneys' fees in *Edelman* as opposed to a class member here; the issue is whether a multiplier can properly be imposed on the lodestar, not who objects to the proposed imposition. Fourth, though imposition of a multiplier may be appropriate when the case is "unattractive" from plaintiff's point of view, Class counsel has offered no evidence to indicate that this case was particularly unattractive at its inception. Fifth, Class counsel has also offered no evidence to indicate that use of a multiplier is "necessary" to the [sic] determine the reasonableness of a fee. *See Guam Soc'y of Obstetricians and Gynecologists v. Ada*, 100 F.3d 691, 697 (9th Cir. 1996). Counsel simply asserts the very general proposition that multipliers are imposed in certain cases, then offers the arbitrary multiplier of 2.13 to arrive at the conveniently round figure of $2.975 million.

Further, even if *Dague* did not operate to bar use of a multiplier in this case, such an imposition would be inappropriate. In all attorney fee cases, there exists a "strong presumption" that the lodestar figure represents the reasonable fee. *Dague*, 505 U.S. at 562. Imposing a risk multiplier would be inappropriate for the following reasons: (1) there is no evidence to suggest that Plaintiff had difficulty obtaining counsel; (2) there is no evidence to indicate that Class counsel expected to receive an

enhanced fee from a multiplier (as opposed to a contingent fee); and (3) Class counsel believed strongly in the merits of their case. In fact, the only illegible risk to Class counsel was that of non-payment of fees. This is a risk that is inherent in any contingent fee agreement involving a complex case and can not, by itself, shake the strong presumption against imposing a multiplier.

Imposing a rewards multiplier would be especially inappropriate as the Settlement Agreement did not provide for one dime of direct compensation to the class, nor did it substantially alter the duties of the Defendants. Though Class counsel argues that the Agreement substantially caused a boost in stock prices, this is pure speculation that was hotly disputed and is, as this Court has already stated, unpersuasive.

REASONABLENESS OF HOURLY RATES

Objector also challenges the hourly rates charged by counsel, claiming that: (1) the rates themselves are inflated; and (2) failure by counsel to delegate tasks where appropriate resulted in an inflated fee bill. In computing the lodestar, the hourly billing rate to be applied is the hourly rate that is normally charged in the community where counsel practices, with the burden upon the fee applicant to establish local rates. *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). Also, to reflect the delay to Class counsel in recovering fees, this Court may use either current rates or historical rates with a prime interest rate enhancement. *Washington Pub. Power*, 19 F.3d at 1305.

Both of Objector's arguments here have merit. First, the billing rates of Class counsel are unnecessarily high, even given the complex nature of this case. The highest hourly rate for the firm Weiss & Yourman was $465.00. For the firm of Stull, Stull & Brody, the highest hourly rate was $495.00. Frankly, no attorney is worth that much, even assuming the market is willing to bear such a ridiculous price.[6] More importantly, though, Class counsel has failed to offer evidence of current prevailing rates in the community. Therefore, this Court sets a top hourly rate of $375.00, thereby reducing counsel's base fee by $173,430.00 to $1,223,677.00.[7]

Second, it appears that some of the work billed by senior Class counsel should have been delegated to attorneys who charge at lower rates. For example, counsel Jules Brody billed 52.5 hours for legal research, a task that most certainly could have been tackled by an associate billing at a lower rate. Adjusting further the rate on these hours from $375 to $180 (the rate charged by associate

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[6] Even if the greats of legal history were to awaken from the dead and form their own mythical law practice, a senior partner at the firm Lincoln, Darrow, Holmes, Marshall & Blackstone would not be worth such an eye-popping hourly rate.

[7] By placing a cap at $475.00 per hour on the rates of attorneys Weiss, Yourman, and Brody, counsel's fees are respectively reduced by $72,337.50, $33,082.50, and $68,010.00. Aside from this cap, this Court adopts Class counsel's current fee rates to compensate for the extended and delayed nature of these proceedings.

Grace Keem), this Court reduces the proposed award an additional $10,237.50 to $1,213,439.50.[8]

REASONABLENESS OF HOURS BILLED

Class counsel states that its fee request is proper not only based on the results achieved in the settlement but because of the amount of work expended in this case. Counsel claims to have spent more than 3,380 hours of time in the prosecution and settlement of this case. Objector challenges this number, arguing that counsel's numbers are "plainly excessive."

This was a fairly complex case, requiring a great deal of discovery and analysis, as well as intense settlement negotiations spanning several months. Except as otherwise stated herein, Class counsel justifies reasonable hours billed for the necessary tasks that accompany litigation such as this.[9]

There is, however, one notable problem. Class counsel billed by the quarter-hour, not by the tenth. Such a calculation – apparently harmless on its face – will over the course of litigation as complex as this add up to tens

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[8] Attorney Joseph H. Weiss also charged for 14.5 hours of legal research. Further reducing Weiss's rate on these hours from his capped hourly fee of $375.00 to $285.00 (that of attorney James Tullman), the fee is hereby reduced by another $1,305.00 to $1,212,134.50.

[9] Objector challenges the number of hours worked, claiming that Class counsel's billings are excessive. Objector, however, offers no concrete examples of excess. To that extent, the number of hours billed are reasonable, especially given the complexity of the case.

of thousands of dollars in unearned legal fees. It is within this Court's authority to reduce the lodestar for "unnecessary and duplicative" work. *Washington Pub. Power,* 19 F.3d at 1298. Further, this Court may reduce an award where the time records are "deficient." *Id.* at 1305-06.[10] In this case, Class counsel's inefficient billing scheme (though generally used in securities cases is deficient because it does not reasonably reflect the number of hours actually worked.[11] Therefore, this Court reduces the adjusted fee by five per cent ($60,606.72) from $1,212,134.50 to $1,151,527.80.

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[10] If Class counsel were to move for reconsideration providing more detailed billing records, this Court would review those records and perhaps reconsider its ruling. *See Washington Pub. Power,* 19 F.3d at 1306.

[11] For example, assume that an attorney charging an hourly rate of $300.00 works for six minutes on a given matter. If that attorney bills by a tenth of an hour, the fee is $30.00 for those six minutes. If billed by the quarter-hour, the fee is $75.00, more than twice the fee for the same amount of work. Of course, this doesn't happen in every billing situation. Further, it would be unfair to Class counsel for this Court to reduce the lodestar by more than half, as the above example might suggest. Therefore, this Court adopts a five per cent reduction in the hope of: (1) more accurately reflecting the actual amount of work performed; and (2) promoting more efficient billing practices in complex litigation such as this.

CONCLUSION

Accordingly, attorneys' fees are awarded to Plaintiff in the amount of $1,151,527.80.

IT IS SO ORDERED.

DATED: June 4, 1997

/s/ James M. Ideman
James M. Ideman
United States District Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALBERT ZUCKER and SARAH MANDELBAUM, Plaintiffs, -against- OCCIDENTAL PETROLEUM CORP., RAY IRANI and HOWARD COLLINS, Defendants.	Case No. CV-91-0214 JMI (Tx) PLAINTIFFS' NOTICE OF MOTION FOR RECONSIDERATION OF THIS COURT'S JUNE 5, 1997 ORDER; MEMORANDUM OF POINT AND AUTHORITIES IN SUPPORT THEREOF DATE: July 28, 1997 TIME: 10:00 a.m. CTRM: The Honorable James M. Ideman

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

NOTICE IS HEREBY GIVEN THAT on the date and at the time set forth above, plaintiffs will move the Court, pursuant to Local Rule 7.16, Rule 59 of the Federal Rules of Civil Procedure, and other applicable law, for reconsideration of this Court's June 5, 1997 Order Awarding Attorneys' Fees, as more specifically specified herein. The motion is based on this notice, the attached memorandum and declaration in support of said motion filed herewith, and all pleadings and other such documents, evidence, memoranda, and any oral argument that may be presented at or in connection with a hearing on this motion, should the Court deem one necessary.

Dated: June 16, 1997

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Class counsel respectfully submit this motion for reconsideration of the Court's June 5, 1997 Order Awarding Attorneys' Fees, on several separate grounds: (1) new caselaw precludes the Court from entertaining the objections of a nonparty who, like Objector Walter Kaufman [sic], lacked the required standing at each and every phase of the instant litigation; (2) because the plaintiff and defendants agreed to a settlement which would have compensated plaintiff attorneys for both time and expenses, Class counsel did not present a motion for recoupment of those expenses, and now requests an order permitting leave to do so; and (3) newly published data confirm that rates in excess of those awarded by the Court are prevalent in the relevant legal community, and Class counsel request the court adjust upward the high rate awarded of $375.00 per hour to rates previously requested.

II. ARGUMENT

A. Objector Walter Kaufmann Lacked The Required Standing To Object To The Requested Attorneys' Fees Because He Fails To Have A Stake In The Outcome Of This Case During Each And Every Phase Of The Controversy

Although this Court correctly observed that "a party must have standing – an actual or threatened stake in the outcome of the controversy – to invoke federal judicial authority (*See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472

[1982])," Class counsel ask the Court to reconsider its ruling which nonetheless permitted the Objector to oppose the attorney fee application.

Standing does not arise merely from one's status as a class member. To object to an award of attorneys' fees, the class member must be *aggrieved* by the proposed action. *In re First Capital Holdings Corp. Financial Prod. Sec. Litig.*, 33 F.3d 29, 30 (9th Cir. 1994)." Order at 3. Yet, while recognizing these fundamental and well established rules of law, this Court held that "[w]hile not expressly addressing this issue on appeal, the Court of Appeals heard Objector's arguments and ruled in part in his favor. Therefore, the Ninth Circuit implicitly recognized Objector's standing to challenge Class Counsel's request for attorney's fees." *Id.*[1]

The standing requirement is a fundamental prerequisite to the exercise of federal judicial power, and is necessary in order to establish the existence of a live "case or controversy" under article III § 2 of the U.S. Constitution. The Supreme Court, in *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1997 U.S. LEXIS 1455 (1997) (See Exhibit A to Declaration of Kevin J. Yourman ("Yourman

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[1] In doing so, Class counsel assume this Court reasoned that because the Ninth Circuit remand called for an articulation of the basis for approving the stipulated fee amount, the Ninth Circuit mandate, in effect, constituted a *sub silencio* [sic] determination by that court that the Objector had the legal standing to continue in his efforts to thwart the stipulated settlement. Class counsel suggest that just because the mandate issued should not be read by this Court as an indication that the reviewing court decided something which, in fact, it did not decide.

Decl.") filed herewith), recently reaffirmed this requirement, observing that it is inappropriate for the federal courts to rule on matters "absent a showing of actual impact on the challenger." (Ginsburg, J., writing for the Court). There, an employee of Arizona State Government filed an action against the State of Arizona to challenge a newly adopted amendment to the Arizona Constitution which required that only English be spoken in conducting business in government offices in that state. While the procedural history of that case is rather involved, what occurred is that during the pendency of the action and after the district court enjoined the law as overbroad, the employee who filed the action left the government service. Through the various appeals that followed, the Ninth Circuit affirmed the injunctive relief that had been granted by the district court. On *certiorari*, the Supreme Court finally disposed of the matter on standing grounds, and ordered the case dismissed. Justice Ginsburg reasoned:

> To qualify as a case fit for federal-court adjudication, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." Preiser v. Newkirk, 422 U.S. 395, 401 [1975]. . . . As a state employee subject to [the new law], Yniguez had a viable claim at the outset of the litigation in late 1988. . . . Yniguez left her state job in April 1990 to take up employment in the private sector where her speech was not governed by Article XXVIII. At that point, it became plain that she lacked a still vital claim for prospective relief. . . .

> When a civil case becomes moot pending appellate adjudication, "[t]he established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss."

1997 U.S. LEXIS 1455, *44-45. Similarly, in *Dufresne v. Veneman*, 1997 U.S. App. LEXIS 13408 (9th Cir. June 9, 1997) (Yourman Decl., Ex. B), the Ninth Circuit dismissed as moot an action brought by a plaintiff who was suing the California Department of Agriculture to enjoin the spraying of pesticides to help eradicate the Mediterranean fruit fly, because the State had discontinued the spraying program. Specifically, following the Supreme Court's ruling in *Arizonans* the Ninth Circuit held that:

> If the case has become moot, even while on appeal, we are required to dismiss it. See *Arizonans for Official English v. Arizona*, 137 L. Ed. 2d 170, 117 S. Ct. 1055, 1068 (1997) ("To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.' ").

1997 U.S. App. LEXIS 13408, *5-6.

It is clear from the record in this case that Mr. Kaufmann has not alleged any pecuniary or non-pecuniary injuries and expects to obtain no benefit from the results of his objection. See Plaintiffs' Reply Memorandum of Law Justifying Fees, dated May 2, 1997 at pp. 2-4. Therefore, Mr. Kaufmann never had standing to object to the settlement or requested attorneys' fees. It is further

clear from the record that Mr. Kaufmann sold his Occidental shares sometime in 1995.[2] *Id.* at 4. Thus, even if Mr. Kaufmann had standing at the time he filed his appeal and the Ninth Circuit made its ruling, he certainly no longer had standing to pursue his objection to the attorneys' fees once he sold his Occidental shares. In addition, because neither counsel nor the Court were aware that Mr. Kaufmann had sold his shares at the time the appeal was pending, that fact was never addressed in the Ninth Circuit's remand.

Although this Court apparently assumed that the Ninth Circuit in reversing on the attorneys' fee issue ruled that Mr. Kaufmann had satisfied the standing requirement, it should be clear from the foregoing authorities and newly developed facts, that not only was that issue never addressed, but even if it had been, subsequent case law and developments would require the Court at this time to rule that Mr. Kaufmann lacks standing to continue his participation in this case.

While Class counsel certainly recognize the important right of interested shareholders to voice their legitimate and *bona fide* objections to settlements or fee requests which do not serve their interests, to permit those who have no pecuniary or other recognized interest, and thus lack standing to do so, would inevitably lead to the filing of numerous unfounded and frivolous objections in securities cases such as this based on improper motives of both proposed objectors and their

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[2] Class counsel did not obtain this information until Mr. Kaufmann and Mr. Schonbrun were deposed in February 1997.

attorneys. Class counsel have previously brought these issues to the attention of this Court in Plaintiffs' Reply Memorandum Justifying Attorneys' Fees, dated May 2, 1997, at ¶VI, pp. 28-33.

As such, Class counsel seek reconsideration of the Court's ruling concerning whether Mr. Kaufmann did in fact have standing to Object to the requested attorneys' fees.

B. Plaintiffs' Counsel Request That They Be Permitted To Seek Reimbursement Of The Expenses They Have Incurred In Connection With The Prosecution To This Litigation

In light of the Court's recent ruling, Class counsel submit that they should be given leave to submit a request for reimbursement of the expenses they have incurred in connection with prosecuting this litigation. As agreed to in the Stipulation of Settlement, the negotiated amount of $2,975,000.00 was to include Class counsel's attorney's fees *and expenses*. As specified on page 17 of the Stipulation of Settlement, filed with this Court on or about December 23, 1992:

> At such time as the Court shall direct, at the Settlement Hearing or thereafter, Plaintiffs' Counsel may apply to the Court for an award of attorneys' fees and reimbursement of expenses accrued in connection with the services rendered in the Action and the Settlement thereof. Plaintiffs' Counsel stipulate that they will not submit a request for fees and reimbursements that excess the sum of Two Million, Nine Hundred and Seventy-Five Thousand dollars

> ($2,975,000.00) (together with interest earned thereon, as set forth separately in the Fee Transfer Agreement describe below), and Defendants stipulate that they will not oppose a request for fees and reimbursements that is equal to or less than that amount.

Yet, this Court only awarded Class counsel their attorneys' fees.

For over four years Class counsel devoted significant resources to prosecuting this litigation and approval of the settlement of this litigation. Significant amounts of expenses have been incurred by Class counsel which include, among other things, expenses relating to (a) experts; (b) travel, lodging and meals; (c) copying; (d) court reporters; (e) secretarial overtime; and (f) postage, telephone and telecopying. It was the intention of the parties, that the attorneys' fees that were previously requested and awarded by this Court incorporate the expenses that were incurred by Class counsel. Class counsel submit that the Court's recent modification of Class counsel's attorneys' fees has denied counsel recoupment of the significant expenses that they have incurred over the past several years. Therefore, Class counsel request that they be permitted to file a petition for recoupment of the expenses they have incurred in prosecuting this litigation and the settlement thereof.

Additionally, on April 11, 1996, this Court entered an order stating that Objector's counsel will be permitted to retain experts on behalf of the class and that their fees (not to exceed $10,000 in expert fees between those experts) will be paid from attorneys' fees ultimately awarded to Class counsel. Class counsel hereby request a

modification of the Court's April 11, 1996 order so that the payment of Objector's counsel's experts' fees be paid out of the reduced portion of the requested attorneys' fees and not the portion that had been actually awarded to Class counsel.

C. Class Counsel Submit That Their Currently Hourly Rates Are Reasonable In Light Of The Rates Charged By Defense Counsel

While adopting Class counsel's "current fee rates to compensate for the extended and delayed nature of these proceedings," the Court capped Class counsel's top hourly rates at $375.00, thereby reducing Class counsel's fees by $173,430.00. Order at 8. According to the Court, Class counsel's fees are unnecessarily high and "[m]ore importantly . . . Class counsel has failed to offer evidence of current prevailing rates in the community." *Id.* In response to the Court's holding, Class counsel submit to this Court the recently published 1996 hourly rates of Law firms which represent defendants in this type of litigation.[3] According to the *The Lawyer's Almanac 1997:*

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[3] The following hourly rates were recently published in the *The Lawyer's Almanac 1997*, Aspen Law & Business. This information was not received by Class counsel until Class counsel had already filed their response papers.

Los Angeles	High Partner
Loeb & Loeb	$450.00
Manatt, Phelps & Phillips	$500.00
New York	**High Partner**
Curtis, Mallet-Prevost, Colt & Mosle	$450.00
Fried, Frank, Harris, Shriver & Jacobson	$500.00
Hughes Hubbard & Reed	$475.00
Proskauer Rose Goetz & Mendelsohn	$440.00
Rosenman & Colinl	$450.00
Seward & Kissel	$450.00

See Yourman Decl. ¶ 3.

While the Court might believe that Class counsel's hourly rates are high, Class counsel's hourly rates are consistent with the hourly rates of defense counsel whose fees are paid on an hourly basis (as opposed to a contingent basis such as Class counsel) and who do extensive defense work in this type of litigation. Even Objector's counsel have acknowledged that one option for this Court in determining a reasonable hourly rate is to look at "the hourly rates of counsel who typically represent defendants in securities class actions." See Page 13 of Objector's Reply Memorandum, filed with this Court on or about March 31, 1997. As such, Class counsel request that the Court reconsider its reduction of Class counsel's attorneys' fees in light of the recently obtained and submitted information listed above.

III. CONCLUSION

Based upon the arguments set forth above, Class counsel request that this Court reconsider its June 5, 1997 Order, and enter a revised order holding that Objector Kaufmann lacked standing to Object to Class counsel's attorneys' fees. Should the Court not reconsider the standing issue, Class counsel request they be given leave to file an application for recoupment of the expenses they have incurred in connection with the prosecution of this litigation. In the event the Objector is allowed to continue as a party, Class counsel request an order that the attorney's fees, if any, awarded to Objector's counsel and his experts are paid out of the portion of the modified fee award that was not awarded to Class counsel. Lastly, Class Counsel request the Court modify the awarded fees in light of the newly obtained and submitted information regarding the hourly rates of defense counsel who do defense work in this type of litigation.

Dated: June 16, 1997

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALBERT ZUCKER and SARAH MANDELBAUM, Plaintiffs, -against- OCCIDENTAL PETROLEUM CORP., RAY IRANI and HOWARD COLLINS, Defendants.	Case No. CV-91-0214 JMI (Tx) CLASS COUNSEL'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION; DECLARATION OF KEVIN J. YOURMAN DATE: July 28, 1997 TIME: 10:00 a.m. CTRM: 7 Hon. James M. Ideman

Class Counsel submits the following reply to Objector's memorandum in opposition to the pending motion for reconsideration. Defendants – who are ultimately responsible for paying the attorney's fees, costs and expenses – have apparently not filed an opposition to the motion.

INTRODUCTION

Objector, in a last ditch effort to avert the Court reconsidering its earlier order, argues that Class Counsel's pending motion is procedurally and substantively defective for a number of reasons. As demonstrated in the motion for reconsideration, and these reply papers, the motion is properly brought under both Rule 59 of the Federal Rules of Civil Procedure and Local Rule 7-16. Objector's opposition, ironically styled as an "objection," is not well-founded.

1. Objector Fails to Address the Standing Issue And Instead Relies on the Earlier Order Giving Him Leave to Participate. As the Motion for Reconsideration Demonstrates, Objector Lacks Any Beneficial Interest, and the Court Should Not Permit His Continued Participation in this Lawsuit.

The gravamen of this motion for reconsideration is that Objector lacks standing to object to the terms of settlement here, thereby rendering the Court without jurisdiction to entertain his objections. This results from the fact that Objector, despite having been given almost two years since the Ninth Circuit's remand, has failed to demonstrate that his "concerns" constitute a live case or

controversy as required by Article III, section 2 of the United States Constitution. While Objector attempts to relegate the jurisdictional issue to the last place in his "objection" papers,[1] it is really *the* primary issue here.[2]

Objector protests that because the issue of his standing has been previously briefed, it is improper for Class Counsel to raise this issue again. In so arguing, Objector completely overlooks well-established rules which make it the duty of both counsel and the Court to determine at *each* stage of the litigation whether continued exercise of federal jurisdiction is proper. See, Rule 12 (h)(3), F.R.Civ.P. ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.") If this Court lacks jurisdiction to entertain Objector's arguments due to his lack of standing, as plaintiffs argue here,

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[1] It is noteworthy that Class Counsel raise this as their first issue, and spend almost half of their motion for reconsideration arguing this point. Well aware of his lack of standing, Objector has avoided and belittled the importance of this argument, and spends much more effort on all other issues than on this.

[2] Objector, citing Local Rule 7.1 – the wrong rule – (Objection, p. 9, ln 6), claims that the instant motion violates what should be the provisions of Local Rule 7.16 by repeating an argument made previously. This completely misrepsersents the present motion for reconsideration, which is directed at subsequent case law developments, and does not repeat the arguments earlier made. The reference quoted at page 9, lines 11-13, does *not* repeat the earlier arguments but was merely a reference to the earlier arguments, to assist the Court in locating them in the event the Court wishes to do so.

Class Counsel believe they have a duty to so inform the Court.[3]

In addition, Objector would have the Court disregard the important and material developments in federal case-or-controversy analysis on grounds that those cases cited did not involve federal securities law. While it is true that the *Arizonans for Official English* and *Dufresne* cases, cited in the moving papers, are not securities class actions suits, the principles discussed in those cases are applicable, because the requirement of standing is premised on the United States Constitution's "case or controversy" requirement, and not on federal securities laws. Because standing is but one aspect of the case-or-controversy requirement for federal jurisdiction,[4] and because

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[3] "To qualify as a case fit for federal court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.' " *Arizonans for Official English*, 137 L.Ed.2d 170 (1997) at paragraph IV.

[4] "Article III, § 2, of the Constitution confines federal courts to the decision of 'Cases' or 'Controversies.' Standing to sue or defend is an aspect of the case or controversy requirement. To qualify as a party with standing to litigate, a person must show, first and foremost, 'an invasion of a legally protected interest' that is 'concrete and particularized' and ' "actual or imminent." ' An interest shared generally with the public at large in the proper application of the Constitution and laws will not do. Standing to defend an appeal * * *, no less than standing to sue, demands that the litigant possess 'a direct stake in the outcome.' "

Arizonans for Official English, supra, 137 L.Ed.2d 170 at paragraph III (1997) [internal citations omitted] (Ginsberg, J., for the unanimous court).

jurisdiction is an issue which is never waived,[5] it is appropriate for Class Counsel to have raised the new Supreme Court and Ninth Circuit precedent. It is particularly appropriate that the Court consider this issue anew since, the Ninth Circuit remand seems to have lost sight of "the essential elements of a justiciable controversy." (See, *Arizonans for Official English, supra,* [Ginsberg, J.])

In the motion for reconsideration, Class Counsel point out that Objector sold and no longer owns Occidental stock, and thus, has no pecuniary or other beneficial interest in the outcome of the action.[6] Objector does not deny his lack of pecuniary or other actual interest. Instead, acting on some metaphysical assumption about what is fair and what is not, he wants this Court to continue to assume jurisdiction over his complaints about the settlement and the previously awarded attorneys' fees. This the Court cannot do under the above-cited authorities, and those previously noted. After Objector sold his shares of stock (sometime before 1995), he lost his right to participate as a party to this action and to challenge both the settlement achieved here between the plaintiff class and defendants and the attorneys' fees previously awarded to Class Counsel. For that reason, Class Counsel believe it important that the Court revisit the issue, and rule that Objector not be permitted to

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[5] Said Charles Alan Wright: "The parties cannot waive lack of jurisdiction, whether by express consent, or by conduct, nor yet even by estoppel. The court, whether trial or appellate, is obliged to notice want of jurisdiction on its own motion. . . ." C.A. Wright, *Law of Federal Courts* (3d ed. 1976) § 8 at pp. 17-18 [citations omitted].

[6] See *Arizonans for Official English, supra,* n. 3.

continue his participation in this lawsuit, whether by means of his objection to the earlier attorneys' fees award, any application for costs and expenses, or any other collateral matter.

2. The Court May Properly Give Class Counsel Leave to Request Reimbursement for Their Expenses and Costs.

Objector, citing Local Rule 7-16(a) argues (1) that Class Counsel should have exercised reasonable diligence by seeking costs in their original motion; and (2) Class Counsel actually sought costs in the earlier filed motion but was awarded none. Once again, Objector mischaracterizes both the rule and the prior proceedings in this case, as summarized below.

The application for attorney's fees was made in response to this Court's "Order to Justify Attorney's Fees" filed November 16, 1995.[7] Because of [sic] the

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[7] The Order to Justify Attorney's Fees dated November 16, 1995, and filed November 16, 1995, reads:

> "IT IS HEREBY ORDERED:
>
> "Pursuant to the court of appeals ruling in this case, this Court makes the following order. Plaintiffs' attorneys ("attorneys") are ordered to justify their previous fee award of $2,975,000. The attorneys must articulate how the plaintiff class received a substantial benefit and why $2,975,000 is an appropriate fee award.
>
> "Specifically, the Court orders attorneys to clearly illustrate how any benefit received by the plaintiff class was *directly* attributable to attorneys' efforts.

Court's order was limited to "fees", there was no reason for Class Counsel to seek expenses or costs in response to that order. Indeed, on January 26, 1996, Class Counsel filed "Plaintiffs' Memorandum Justifying Attorneys' Fees[.]" "Supplemental Declaration of Jules Brody In Support of Application for Award of Attorneys' Fees and Reimbursement of Expenses[,]" and "Declaration of Kevin J. Yourman in Support of Plaintiffs' Memorandum Justifying Attorneys' Fees[.]"[8] Nowhere did Class Counsel actually seek reimbursement for expenses or

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> "In addition, the Court orders attorneys to supply the Court with a *detailed* hourly breakdown of all work performed in this case on behalf of plaintiff class.
>
> "Attorneys are ordered to comply with this order by January 26, 1996.
>
> "IT IS SO ORDERED.
>
> /s/
> "James M. Ideman
> United States District Judge"

[8] Objector's counsel makes much ado about the fact that the declaration filed by Mr. Brody contains the phrase "and Reimbursement of Expenses" in its title. See Objection at page 4, Ins 6-9. Even a cursory examination of the contents of the declaration, and the supporting schedules, specifically Exhibits B and C thereto, reveal that only attorney and paralegal time were claimed, *not* costs or expenses.

Objector's counsel similarly argues that Mr. Yourman filed a declaration to "support plaintiffs' position that $2,975,000 in attorneys' fees and expenses, is fair, reasonable and justified." Once again, Objector fails to inform the Court that the declaration itself, on page 11 at paragraph 54, only claims 3,880 hours of attorney time, as itemized in Exhibit F, and does *not* itemize or claim reimbursement for out-of-pocket costs or expenses.

costs, because that was not what the Court had asked them to submit.

In addition, Objector fails to recognize that Local Rule 7-16, governing motions for reconsideration, has three disjunctive provisions. Objector, while quoting portions of the rule, focuses his discussion entirely on subdivision (a)'s requirement of reasonable diligence. Subdivision (b), however, requires merely "the emergence of new material facts or a change in the law occurring after the time of such decision." Subdivision (c) requires a "manifest showing of a failure to consider material facts. . . . " Class Counsel have satisfied all three requirements.

The procedural history of this case demonstrates the propriety of reconsideration here: Plaintiffs and defendants entered into a settlement agreement subject to court approval. The Court approved the settlement, over the protests of Objector, and defendants disbursed the negotiated attorneys' fees and costs of $2.975 million to Class Counsel. Objector then filed an appeal with the Ninth Circuit. The Ninth Circuit on October 6, 1995, affirmed in part, but remanded on the attorney fee issue because this Court failed to "articulate its reasons for concluding that the plaintiff class received a substantial benefit and that $2.975 million is an appropriate amount of fees to award."

Following the remand, on or about November 1, 1995, Objector filed an "Application for Award of Attorney's Fees or, in the Alternative, Request to Defer Award of Attorney's Fees Until District Court Compliance with Memorandum on Remand." On November 16, 1995, this

Court issued its "Order to Justify Attorney's Fees" and memoranda were submitted on both the fee application and objections to the application by Objector. (See N. 8, *supra*.) Then, on June 5, 1997, the Court issued its order which failed to allow the negotiated and previously awarded attorney's fees to stand and, instead, ordered payment of a lodestar fee award to Class Counsel.

Objector opposed the application, allegedly on the merits, disingenuously claiming that the lodestar attorneys' fee award has provided Class Counsel with a "handsome profit." Objection, p. 5. This misses the point: while Class Counsel have received an award for their time, they have not been reimbursed for their out-of-pocket expenses, such as expert witness fees, deposition costs, travel, photocopying, telephone calls, postage, messengers, secretarial overtime, and the like. As the declaration of Mr. Yourman, in support of the Instant Motion for Reconsideration points out, the original settlement for $2,975,000, which was negotiated with counsel for defendant Occidental Petroleum Company at arm's length, was contemplated to include not only attorney time but all costs and expenses of prosecuting the action on behalf of the Class. With the reduced award of attorney's fees entered on June 5, 1997, however, the underpinning for the settlement which would have reimbursed Class Counsel for their out-of-pocket expenses, has been undone. It is not unreasonable, and indeed would be unfair, for Class counsel to be precluded by the protests of a completely disinterested Objector from seeking reimbursement for Class Counsel's expenses and costs. Not even defendants, who would ultimately be responsible for

paying the expenses and costs awarded, have seen fit to object to the reasonableness of the request.

Given these developments in the case, and the fact that Class Counsel were neither asked by the Court to apply, nor did they apply, for reimbursements of expenses and costs, it is only fair that they be permitted to seek such reimbursement, as they would in any other lodestar application case. Technically, under the provisions of Local Rule 16, an application for costs need not even be made until after entry of judgment, which here appears to have been the attorney fee award of June 5, 1997. The motion merely requested leave to file the application for costs as a modification to the June 5th order, since a motion for reconsideration was being filed in any event.

3. Should Objector Be Permitted to Participate, the Court May Properly Modify Its Earlier Order Regarding the Source of Payment of Objector's Expenses.

Should the Court allow the continued participation of Objector, over opposition of Class Counsel, the Court should then modify its June 5, 1997, order on the source of payment of expert witness expenses to Objector's Counsel. The motion for reconsideration anticipated the effort by Objector's Counsel to seek an award of costs and expenses.[9] When the Court issued its order of April

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[9] Objector's counsel has filed a motion for attorney's fees and expenses and set hearing on that motion for September 15, 1997.

11, 1996, neither Class Counsel for Objector could have known that this Court would ultimately issue an order of the type and terms entered on June 5, 1997. Under the provisions of Rule 59 of the Federal Rules of Civil Procedure, as well as the Local Rules, it is appropriate for the Court to modify its June 5, 1997, order to provide for those *subsequent* developments. In this pending motion, Class Counsel are merely asking that Objector be paid out of the funds previously set aside for Class Counsel by the terms of the stipulated settlement, but which has not been rejected by the Court.

Objector argues that the instant motion is really a motion to reconsider an order issued in April 1996 and not of the June 5, 1997 order. Objector, however, misconstrues what the April 1996 order was.

The order of April 11, 1996, dealt with the extent to which Objector would be permitted to hire expert witnesses and how much those experts would be compensated.[10] In contrast, the order of June 5, 1997, was an

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[10] In pertinent part, the court's April 11, 1996, ruling was:

"3. – Plaintiff's counsel states that Objector's experts should be paid by Objector or his attorney. Plaintiffs' counsel contends that it litigated this case on a contingency basis, thus incurring substantial costs that conceivably might never be reimbursed.

"As plaintiff's counsel indicates that their experts cost approximately $5,000 each, the Court allows Objector to spend up to $10,000 in expert fees. As Objector should be allowed to use at least two experts, $10,000 appears reasonable. Moreover, Objector's costs in retaining experts will come from

award of attorney's fees only; this order did not deal with the issue of expert costs which might be claimed by Objector's counsel.

If anything, given that the April 1996 order provided, "*[i]f plaintiffs' counsel objects to Objector's experts, it can raise this objection at the time briefs re: fees are filed*[.]" the instant motion may possibly be premature, and not late. The instant motion, however, is not contrary to the quoted language, and Objector has failed to show why Class Counsel should not be permitted to raise this issue at this time, since it is really collateral to the June 5, 1997, order.

Objector also claims that the motion is late under Rule 59 of the Federal Rules of Civil Procedure, because it should have been brought within one year of the date of entry of the order R.59(b), F.R.Civ. P. Here, the April, 1996 order was an interlocutory discovery order that was filed only, and not entered, and does not technically constitutes a judgment. See, Rules 58 and 79, F.R.Civ.P. Indeed, Objector has not yet been awarded costs and fees.

As to the June 5, 1997, order, the motion for reconsideration was made within ten days as required by Rule

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the fee award, if any, ultimately awarded plaintiffs' counsel.

"Plaintiffs' counsel also asks this Court to require Objector to obtain Court approval before retaining an expert. This appears unnecessary as the Court does not desire to micromanage every proceeding in this case. *If plaintiffs' counsel objects to Objector's experts, it can raise this objection at the time briefs re: fees are filed.*" Order Re Clarification; OSC Re Objector's Counsel's Benefits filed April 11, 1996, p. 2. [Emphasis added].

59, F.R.Civ.P., and is therefore timely. Inasmuch as Rule 59 has been held applicable to motions for post-judgment attorney's fees, *see Hairline Creations, Inc. v. Kefalas*, 664 F.2d 652 (7th Cir. 1981), and Moore's Federal Practice, ¶ 59.4, there is no reason why the instant motion cannot be made under the provision of that rule.

Similarly, because the motion covers matters which were not reasonably foreseen by developments in this case, the motion is properly made under the provisions of Local Rule 7-16.

4. The Motion for Reconsideration Demonstrates that the Request for Higher Hourly Rates Is Reasonable And Consistent With Those Charged by Defense Counsel.

Objector, once again arguing half-truths, claims that the motion for reconsideration is based on information which could have been known, in the exercise of reasonable diligence, at the time the original papers were submitted.

This is not true. As Mr. Yourman's declaration notes, the information from the Lawyer's Almanac was only made available to Class Counsel's in June 1997, and was not available when Class Counsel submitted their pretrial papers justifying the attorney's fees previously awarded to Class Counsel. In addition, contrary to Objector's argument that Class Counsel's hourly rates should be set as Class Counsel's 1993 rates, the Court while reducing Class Counsel's hourly rates utilized a current

hourly rates approach to compute Class Counsel's lodestar. Order at 8 n.7. Moreover, Class Counsel have submitted the hourly rates of firms that do defense work to demonstrate that while this Court believes that Class Counsel's hourly rates are high, Class Counsel submit that they are consistent with the rates charged by defense counsel that practice in this field.

Objector also declares that the Los Angeles firms cited in the motion as having high hourly rates do not "to his knowledge" handle federal securities litigation. As demonstrated in the attached declaration, the firms do, in fact, handle federal securities litigation. In addition, the hourly rates for securities law, along with antitrust and other sophisticated business litigation, are at the high end of the large corporate law firms' rates.

CONCLUSION

Defendants, the only adverse parties with a genuine interest in the outcome of this motion, have not opposed it. Instead, the only opposition comes from Objector, whom Class Counsel have demonstrated to be without a legitimate interest in this case. Thus, for the foregoing reasons, as well as those previously addressed in the moving papers, Class Counsel respectfully request that

the Court reconsider its order of June 5, 1997, as previously requested.

DATE: July 18, 1997

Respectfully submitted,

KEVIN J. YOURMAN
ANTHONY P. SERRITELLA
JAMES E. TULLMAN
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By: /s/ James E. Tullman
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALBERT ZUCKER, et al., Plaintiffs, v. OCCIDENTAL PETROLEUM CORP., et al., Defendants.	) CV 91-0214 JMI (RCx))) **ORDER DENYING**) **MOTION FOR**) **RECONSIDERATION**)) **ORDER AMENDING**) **THIS COURT'S ORDER**) **OF APRIL 11, 1996**)) (Filed Aug. 1, 1997)

IT IS HEREBY ORDERED:

Plaintiffs' Motion for Reconsideration came before this Court on July 28, 1997. After careful review, considering all the arguments and materials presented by the parties, the Motion is hereby DENIED.

BACKGROUND

This is a class action for securities fraud. Plaintiffs brought this suit alleging that Defendants made material misrepresentations of fact to Plaintiffs' detriment. The parties entered into a Settlement Agreement ("Agreement"), which this Court approved. This Court also approved an award of $2.975 million in attorneys' fees. The Ninth Circuit affirmed the settlement but reversed on the issue of fees, as it was stated that this Court did not "articulate its reasons for concluding that the plaintiff class received a

substantial benefit and that $2.975 million is an appropriate amount of fees to award." On remand, this Court adjusted the award downward to $1,151,527.80.

STANDARD OF REVIEW ON MOTION FOR RECONSIDERATION

Now, Plaintiffs move for reconsideration of the second fee award. A motion for reconsideration may be made *only* on the grounds of: (1) material difference in fact or law from that presented to the Court that could not have reasonably been known at the time of decision; (2) the emergence of new material facts or law occurring after the time of decision; or (3) a manifest showing that the court failed to consider material facts or law. C.D. Cal. R. 7.16.

Plaintiffs first assert that Objector Walter Kaufman lacked standing to challenge the fee award. This Court did consider Plaintiff's standing arguments originally, and concluded that the Objector must have had standing, otherwise the Ninth Circuit would not have heard his appeal, much less reversed and remanded the case. Therefore, Plaintiffs merely reargue their position with respect to standing, which is clearly improper under Rule 7.16.

Next, class counsel has submitted hourly rates allegedly "consistent" with those of other firms in the hope that this Court will lift its hourly rate cap of $375.00. These rates, however, were apparently available to class counsel at the time this Court awarded attorneys' fees, yet they were never presented to this Court. Class counsel does not explain why it failed to offer this information

previously. Therefore, this issue is improper for reconsideration under Rule 7.16.

Finally, Class counsel seeks leave to submit a request for reimbursement of expenses that they have incurred in this litigation. Such expenses were apparently contemplated in the Settlement Agreement in which Class counsel negotiated an amount no greater than $2.975 million in attorneys' fees *and* expenses. Class counsel, however, failed to document these expenses for this Court after the Ninth Circuit had already reversed and remanded this case, demanding specific findings supporting any award. As such, this issue is also not proper for reconsideration.

CONCLUSION

Accordingly, Plaintiffs' Motion for Reconsideration is hereby DENIED. This Court does, however, AMEND its Order of April 11, 1996, allowing Objector's expert fees (no greater than $10,000.00) to be paid from the reduced

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[1] On April 11, 1996, this Court ordered that Objector's counsel could retain experts on behalf of the class, with such fees (not to exceed $10,000.00) to be paid from attorneys' fees ultimately awarded to class counsel. As part of its request to recoup fees, Plaintiffs urge this Court to amend its Order so that Objector's expert fees be awarded from the *reduced* portion of the requested fees and not the portion actually awarded to Class counsel. This request is reasonable and was brought in a timely manner. Therefore, Plaintiffs' request to amend the Order of April 11, 1996, is hereby GRANTED.

amount of professional fees, and not from the amount actually awarded to Class counsel.

IT IS SO ORDERED.

DATED: July 31, 1997

/s/ James M. Ideman
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALBERT ZUCKER, et al., Plaintiffs, v. OCCIDENTAL PETROLEUM CORP., et al., Defendants.	CV 91-0214 JMI (RCx) **ORDER AWARDING ATTORNEY'S FEES AND EXPENSES TO PLAINTIFF CLASS MEMBER/OBJECTOR WALTER KAUFMANN** (Filed Oct. 2, 1997)

IT IS HEREBY ORDERED:

Plaintiff class member/objector William Kaufmann's Application for Attorney's Fees and Reimbursement of Expenses came before this Court on September 15, 1997. After careful review, considering all the arguments and materials presented by counsel, attorney's fees and expenses are awarded in the amount of $48,774.62.

BACKGROUND

This is a class action for securities fraud. Plaintiffs brought this suit alleging that Defendants made material misrepresentations of fact to Plaintiffs' detriment. The parties entered into a Settlement Agreement ("Agreement"), which this Court approved. The Ninth Circuit affirmed this Court's approval of the settlement but reversed on the issue of fees, as this Court did not "articulate its reasons for concluding that the plaintiff class received a substantial benefit and that $2.975 million is an appropriate amount of fees to award." To satisfy the

Ninth Circuit's mandate, this Court ordered Plaintiff's counsel ("Class counsel") to file a brief with the Court justifying its fees. This Court then allowed class member Walter Kauffman ("Objector") to file a response. Plaintiffs filed a Reply Memorandum.

This Court's Order Awarding Attorneys' Fees, entered on June 5, 1997, thoroughly documented and articulated its reasons for concluding that $1,151,527.80 was an appropriate amount of fees to award to class counsel.[1] Objector Kaufmann now moves the Court for an award of attorneys fees and reimbursement of expenses *for his role as objector.* This motion is unopposed.[2]

DISCUSSION

A. Objector is Entitled to Reasonable Attorney's Fees Without Reference to the Specific Monetary Benefit Created For the Class

Objectors play an important role in maintaining the integrity of class action litigation. Well formulated arguments presented by objectors provide the adversarial perspective which has proven so important to our judicial

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[1] On August 12, 1997, Plaintiffs Albert Zucker and Sarah Mandelbaum, and their attorneys, the law firms of Weiss & Yourman and Stull, Stull, & Brody, filed a notice of appeal concerning this Court's June 5, 1997 "Order Awarding Attorneys' Fees" and this Court's August 4, 1997 "Order Denying Motion for Reconsideration – Order Amending This Court's Order of April 11, 1996."

[2] Pursuant to Local Rule 7.9, the failure of any other parties to file papers in this matter may be deemed by the Court as consent to the granting of this motion.

system. While the value derived from the presence of objectors *may* be reflected in an improved *economic* benefit created for the class, it is certainly not limited to only economic measurements. Objectors perform a valuable service to the class by raising and articulating issues of fairness and equity which otherwise might be disregarded. In this fashion they enhance the overall presentation of issues to the Court. As such, objectors convey a benefit on the class regardless of whether or not the positions advocated by the objectors have any actual effect on the settlement or its terms.[3]

In this case, Objector Kaufmann made worthy contributions to the overall presentation of issues regarding the appropriate attorneys' fees for Class Counsel. Objector Kaufman's [sic] input was recognized by the Ninth Circuit Court of Appeals as well as by this Court. For this service, Objector Kaufmann deserves to be awarded reasonable attorney's fees and expenses, regardless of the

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[3] *See Ace Heating and Plumbing Co. v. Crane Co.*, 453 F.2d 30, 35 (3rd Cir. 1971) (recognizing that fees for legal services of objectors' counsel should be awarded so as not to "chill challenges to the fairness of a settlement"); *In Re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 359 (N.D.Ga. 1993) (compensation appropriate where "[t]hese objectors significantly refined the issues germane to a consideration of the fairness of this complex settlement . . . [and where] the objectors participated significantly in the process and performed a valuable service for the class, even thought [sic] their objections did not prevail."); *In Re Unisys Corp. Retiree Med. Bene. ERISA Lit.*, 886 F. Supp. 445, 483 (E.D.Pa. 1995) (awarding attorneys' fees to counsel who helped clarify issues pertinent to the Court's approval and who served as the "devil's advocate" in objection to the settlement).

Ninth Circuit's final determination on the appropriateness of the award of attorneys' fees to Class Counsel which is currently on appeal.

B. Objector's Fees

This Court will use the lodestar/multiplier method in calculating fees. Using this method, a court "calculates the 'lodestar' by multiplying the reasonable hours expended by a reasonable hourly rate." *See In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1294 n.2 (9th Cir. 1994). "The Court may then enhance the lodestar with a 'multiplier,' if necessary, to arrive at a reasonable fee." *Id.*

On August 13, 1997, Objector's counsel filed a 10-page, single-spaced Supplemental Declaration which details his time and money expenditures in connection with this Court's reconsideration of the reasonableness of Class Counsel's attorneys' fee request and the value of the settlement obtained for the class. This bill catalogues every task he performed in that regard between October 1995 and July 1997.

Objector's counsel has both calculated his lodestar including the time spent preparing this fee application and omitting the time spent preparing this fee application. The Court finds that, because this type of law is counsel's specialty, and because he must know that his compensation hinges on the detailed documentation of

his services, counsel is not permitted to recover for time spent preparing this fee application.[4]

Objector recommends $250 as an hourly wage for his attorney. This wage is reasonable both in light of counsel's experience in this field and in relation to the $350/hour cap that this Court permitted Class Counsel to recover. With respect to Objector's counsel's travel time, the Court will allow counsel to recover his full hourly wage for time spent traveling.

Objector's counsel argues that he is entitled to have his lodestar enhanced by a multiplier. Among others, he lists the following reasons in support of this alleged entitlement: his hours claimed are modest and do not reflect the actual time spent on the matter; he runs a small efficient law firm; he regularly appears against the brightest and craftiest attorneys in the profession; he fights an uphill battle from an unenviable position; and his work is for the public good.

Although counsel's work is commendable on many levels, the Court finds that he has not provided sufficiently compelling reasons to deviate from the "strong presumption" against awarding multipliers. *See City of Burlington v. Dague*, 505 U.S. 557, 562 (1992). Objector's counsel should be fairly and reasonably compensated for

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[4] The relative time spent preparing this application, as compared with substantive work on the case supports non-payment for preparation of the fee application. For example, while Objector's counsel expended 50 hours and 35 minutes preparing the fee application, he only spent 40 hours and 40 minutes on the Reply Memorandum, and 55 hours and 25 minutes on total discovery.

his services – such compensation is necessary to ensure that lawyers such as he can effectively and successfully continue their work. He should not, however, receive enhanced compensation for the undesirability of the law practice which he himself has chosen. Thus, the Court declines to apply a multiplier to the lodestar calculation of Objector's attorney's fees.

Finally, Objector's counsel requests to be reimbursed for expenses. These expenses, including but limited to parking, car rental, Federal Express, faxes, and photocopies, have been itemized and appear reasonable.

CONCLUSION

Based on the unopposed papers submitted by Objector in application for an award of attorney's fees and a reimbursement of expenses for work performed by his counsel, the Court hereby awards to Objector fees and expenses in the following amount:

TOTAL HOURS, (less fees application preparation) [158 HRS 35 MINS * $250]	$39,645.83
TOTAL TRAVEL HOURS [28 HRS. 40 MINS * $250]	7,083.34
TOTAL EXPENSES	2,045.45
	$48,774.62

The Court hereby ORDERS that these fees and expenses in the amount of $48,774.62 are to be paid by Defendant Occidental Petroleum Corp. The fees and expenses awarded to Objector's counsel are completely

separate and distinct from the fees and expenses awarded to Class Counsel.

IT IS SO ORDERED.

DATED: October 1, 1997

/s/ James M. Ideman
James M. Ideman
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT ZUCKER, et al., Plaintiffs-Appellees, v. OCCIDENTAL PETROLEUM CORP., et al., Defendants-Appellees, WALTER KAUFMANN, Class Member, Objector and Appellant.	No. 93-56714 D.C. No. CV 91-0214 JMI **MEMORANDUM*** (Filed Oct. 06, 1995)

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

Argued and Submitted July 12, 1995
Pasadena, California

Before: FARRIS and O'SCANNLAIN, Circuit Judges, and TASHIMA,** District Judge.

This is a class action for securities fraud in which the parties entered into a settlement agreement, subject to the

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** The Honorable A. Wallace Tashima, United States District Judge for the Central District of California, sitting by designation.

approval of the court. Walter Kaufmann ("Kaufmann"), a class member, filed a timely objection to the settlement agreement and proposed award of attorney's fees. Nonetheless, the district court approved the settlement and awarded attorney's fees of $2,975,000 to class counsel. Kaufmann appeals. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part and vacate and remand in part.

On appeal, Kaufmann contends that the district court violated his due process rights, and that the fee award was excessive compared to the benefits to the class.

DISCUSSION

I. DUE PROCESS

Kaufmann argues that his due process rights were violated because the district court did not allow any objection and did not hold an oral hearing. We review de novo the district court's conclusions regarding the due process claim. *National Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 587 (9th Cir.), *cert. denied*, 114 S. Ct. 634 (1993).

A. Objections to Settlement

Kaufmann quotes the following language from the notice to class members to support his due process denial claim: "in no event shall a person be heard in opposition to the Settlement."

Kaufmann has taken this phrase out of context. Read in full, the district court merely required that objectors first file and serve notice and briefs: "in no event shall a person be heard in opposition to the Settlement . . .

unless, on or before March 1, 1993, such person (a) files with the Clerk of the Court notice of such person's intention to appear, together with a written brief . . . ; and (b) serves copies of any such notice, brief . . . upon each of the attorneys."

Contrary to Kaufmann's contention, the district court did permit class members to object. Indeed, Kaufmann himself filed objections to the settlement. The district court did not violate Kaufmann's due process right to object to the settlement.

B. Right to Oral Hearing

Kaufmann also contends that the district court violated his due process right to an oral hearing.

"It repeatedly has been held that there is no constitutional right to present oral argument on a motion." 12 Wright & Miller, Federal Practice and Procedure § 3091 at 184 (2d ed. 1973). *See Morrow v. Topping*, 437 F.2d 1155, 1156 (9th Cir. 1971) (rejecting due process claim). Due process does not require an oral hearing in every situation. *See, e.g., FCC v. WJR, the Goodwill Station, Inc.*, 337 U.S. 265, 275-76 (1949) (FCC may decide certain matters without oral hearing). The district court's waiver of oral argument in this case did not violate due process.[1]

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[1] It should also be noted that oral argument is not required by the Federal Rules of Civil Procedure. "To expedite its business the [district] court may make provision by rule or order for the submission and determination of motions without oral hearing. . . . " Fed.R.Civ.P. 78. Accordingly, like many other district courts, the Local Rules of the Central District of

In his reply brief, Kaufmann argues for the first time that *Mandujano v. Basic Vegetable Prod., Inc.*, 541 F.2d 832, 835 (9th Cir. 1976), and *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1377 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2707 (1994), neither of which is a due process case, require a different result. Because Kaufmann failed to raise this argument earlier, we decline to address it. *See In re Frontier Properties, Inc.*, 979 F.2d 1358, 1368 (9th Cir. 1992).

II. ABUSE OF DISCRETION

Because no constitutional right is involved, the district court's failure to hold an oral hearing is reviewed for an abuse of discretion. *Spradlin v. Lear Siegler Management Serv. Co.*, 926 F.2d 865, 867 (9th Cir. 1991). Further, even assuming the right to an oral hearing, we will not reverse absent a showing that denial of the right resulted in prejudice. *Id.* at 869.

Kaufmann has not pointed to anything on the record that shows an abuse of discretion. Objecting class members were permitted to submit briefs in support of their positions. Kaufmann himself did so. Nothing in the record indicates that oral argument would have added to

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California provide that a judge may "dispense with oral argument on any motion except where an oral hearing is required by statute, the F.R.Civ.P. or these Local Rules." C.D.Cal. Local Rule 7.11. Other district courts in the Ninth Circuit have similar rules. *See* D. Alaska R. 5(C)-(D); D. Ariz. R. 1.10(f)(2); E.D. Cal. R. 230(h); N.D. Cal. R. 220.1; S.D. Cal. R. 7.1(d)(1); D. Haw. R. 220-2(d); D. Idaho R. 7.1(c); D. Mont. R. 220-1(a); D. Nev. R. 140-9; E.D. Wash. R. 7(h)(3); W.D. Wash R. 7(b)(6).

the district court's understanding of the issues before it or altered the outcome. The district court did not abuse its discretion in not permitting oral argument.

III. ATTORNEY'S FEES

Finally, Kaufmann challenges the award of $2,975,000 to plaintiffs' attorneys, in light of the "illusory" benefits to the plaintiff class.

We review the award of attorney's fees for abuse of discretion. *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir. 1994) ("*WPPSS*"). Although we would normally review findings of fact underlying an award of fees under the deferential, clearly erroneous standard, *Lewis v. Anderson*, 692 F.2d 1267, 1269 (9th Cir. 1982), here there are no findings that can be reviewed.

The district court did not articulate its reasons for concluding that the plaintiff class received a substantial benefit and that $2.975 million is an appropriate amount of fees to award. As a result, we cannot adequately review the fee award.

Accordingly, "We vacate the fee award and remand for further consideration of the issue." *WPPSS*, 19 F.3d at 1302.

CONCLUSION

We affirm the district court's approval of the settlement agreement. However, we must vacate its fee award and remand that issue to the district court. Each side shall bear their, its or his own costs on appeal.

AFFIRMED in part, VACATED in part and REMANDED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALBERT ZUCKER and
SARAH MANDELBAUM,

Plaintiffs,

vs.

CV 91 0214 JMI (Tx)

OCCIDENTAL PETROLEUM
CORP., RAY IRANI AND
HOWARD COLLILNS,

Defendants.

DEPOSITION OF WALTER KAUFMAN [sic]

Wednesday, February 19, 1997

* * *

[p. 20] Q. Oh, "Price, 26.1"?

A. "As of 1," looks like "30," then it says "Price, 26.5."

Q. So the rest is just a matter of –

A. Multiply by 4, that would yield something like 10 something.

Q. I thought it was. My copy is just very difficult to read.

A. Mine is too. But I think that's something like 10,600, but you can do the multiplication on it.

Q. Do you recall, Mr. Kaufmann, whether you ever sold your shares?

A. I did sell my shares. Yes, I did.

Q. And do you recall approximately when?

A. I don't recall, no.

Q. Let's see. Your purchase was in 1990.

A. It was definitely subsequent to the purchase.

Q. Right. Well, let me ask you this: Did you ever buy more shares of Occidental since this purchase of the 400?

A. I don't think so, no.

Q. And do you recall whether you sold all your shares at some point?

A. I believe I sold all my shares and never repurchased.

[p. 21] Q. All right. With respect to –

A. This is to the best of my recollection.

Q. I understand.

With – my understanding is that your purchase occurred in July of 1990. Before I have put my foot in my mouth – right.

A. That sounds right.

Q. Actually, I think the date – perhaps your counsel could help me out.

The date on this, it says the statement period is 1-27 to 2-23, 1990. And maybe instead of a 7, that's a 2. Maybe that's February of 1990.

A. It's very possible.

Q. Okay. Do you recall whether you sold it in 1990 or 1991?

A. I honestly don't. I must say that 1990 was a difficult year. My father's death, I had a serious traffic accident and so forth, and I must admit that my memory is hazy. So exactly when I sold stock and so forth –

Q. How about this way. Going back, do you recall whether you sold it last year, in the '96 year?

A. No, I didn't sell it last year.

Q. How about the '95 period?

A. No.

[p. 22] Q. Okay. Previous –

A. But prior to that, and that's all I can tell you, because I don't want to say something that's not right.

But I know I didn't sell it this year or last year.

Q. Okay. Now, we already established that there was no written retainer agreement between you and your counsel. That's correct?

A. That is correct.

Q. But at some point in time, you did retain him to represent you in this dispute?

A. Well, I agreed to be [sic] would represent me, yeah. I guess that's –

Q. And at some point in time, he filed an objection on your behalf?

A. That's correct.

Q. Okay. Do you recall why you retained Mr. Schonbrun to file an objection on your behalf?

A. Well, at that time I read the

* * *

[p. 35] MR. SCHONBRUN: Linked?

THE WITNESS: Were they linked, those two decisions?

MR. TULLMAN: Q. Were they dependent upon one another?

A. Oh, absolutely, yes.

Q. Mr. Kaufmann, are you claiming that you've personally suffered any damages as a result of either the settlement or the fees award?

MR. SCHONBRUN: I'm going to object – I'll allow him to answer, but I'm going to object to this question on the grounds that in this stage in the litigation, I think the information being sought by that question is irrelevant to the proceedings in their present cast.

MR. TULLMAN: With that objection on the record, for the first part – for the most part, I don't agree with that. However, let's not waste –

MR. SCHONBRUN: I'm not instructing you not to answer. So you can answer the question if you want, if you can.

THE WITNESS: I'm not sure whether I have any personal damages or not. I'm basically objecting to it as a matter of principle.

If I do have damages, they'd be relatively [p. 36] small, since I only owned 400 shares, and I'm not sure exactly when I sold them.

So actually, my answer is, I don't know.

MR. TULLMAN: Q. So I also assume – I assume, then, that you didn't conduct any independent study or investigation to determine whether you suffered any monetary damages?

A. No. I'm not interested in personal – I'm not interested in the issue of personal monetary damages.

Q. Was one of the bases for your objection the belief that other Occidental shareholders were damaged?

A. Yes.

Q. And how so?

A. Well, the corporation's treasury has 3 million less dollars in it, without any – without any benefit to the corporation or any effect on the share price.

Q. Did you do –

A. Positive effect on the share price.

Q. Did you do any either study by yourself or someone on your behalf to determine whether the class did in fact suffer any monetary damages?

A. I didn't do any independent study, no. I don't think it required independent study.

Q. And in filing your objection, are you seeking to represent other shareholders besides yourself?

* * *

[p. 43] in this instance?

MR. SCHONBRUN: Again, I'm going to object to that question as irrelevant to this proceeding.

THE WITNESS: I can't say anything beyond what I said.

I think whatever a just fee is, what commends itself to my common sense and sense of fairness and justice, is that 3 million for no benefit is excessive. Given all of the circumstances in the entire context, what might be fair, I don't know.

MR. TULLMAN: Q. Mr. Kaufmann, do you expect to obtain any monetary award as a result of filing your objection?

A. Not – I don't have any expectations of a monetary award.

Q. And with the understanding that there are no documents that memorialize a retainment of your counsel, do you have a specific arrangement with your counsel with respect to his fees?

A. No. I think it's an implicit understanding that I don't get anything out of it, and I don't owe anything for it.

Q. Okay. So you're not compensating your counsel on an hourly basis?

A. No.

* * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALBERT ZUCKER, et al., Plaintiffs, vs. OCCIDENTAL PETROLEUM CORP., et al., Defendants.	)	No. CV-91-0214 JMI (Tx)

DEPOSITION OF LAWRENCE W. SCHONBRUN

Tuesday, February 25, 1997

* * *

[p. 78] to break the two subject matters apart.

A. I appreciate the way you handled his deposition, Jim, and I do thank you. He's an older gentleman, and I appreciate it.

MR. TULLMAN: Off the record.

(A discussion was held off the record.)

BY MR. TULLMAN:

Q Mr. Schonbrun, are you claiming that your client suffered any damages as a result of the settlement or the awarded attorney's fees?

A I think I have to say I don't know. In other words, I don't believe that it's an issue.

Q So you don't believe whether your client suffered any damages is relevant to the issues that are before us?

A Right.

Q Do you believe whether the class suffered any damages as a result of the settlement or awarded attorney's fees is relevant to the issues before the court?

A I don't think – I don't think it's an issue.

Q I'm sorry. I didn't mean to –

A Go ahead.

Q Did you do any analysis either – [p. 79] strike that.

Did you do any analysis to determine whether your client or the class suffered any monetary damages as a result of the settlement?

A No. I don't understand that to be the focus.

Q Mr. Schonbrun, do you recall – strike that.

You have provided for us a document which memorializes Mr. Kaufmann's purchase of Occidental shares.

Do you recall that?

A Yes. Very definitely.

Q Do you recall when Mr. Kaufmann sold his shares?

A No.

Q I know that there was some vague discussion during his deposition concerning that. And at this time I would like – I would ask that if there is a document in his possession or control that reflects his sale of Occidental shares, I would request its production.

A Okay. Jim, let me just say, with regard to these requests, what I'd like you to do, if you don't mind, is, sort of after you've got these,

* * *

Supreme Court, U.S.
FILED
MAR 13 2000
CLERK

(2)

No. 99-1181

In The

Supreme Court of the United States

ALBERT ZUCKER, SARAH MANDELBAUM, WEISS & YOURMAN and STULL, STULL & BRODY,

Petitioners,

vs.

OCCIDENTAL PETROLEUM CORP., RAY IRANI, HOWARD COLLINS, WALTER KAUFMANN and LAWRENCE W. SCHONBRUN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals was correct in ruling that the issue of plaintiff class member/objector Walter Kaufmann's standing need not be resolved in order to dispose of petitioners' appeal.

2. Whether, if the Ninth Circuit was incorrect as regards question No. 1, it was nonetheless correct in its determination that Mr. Kaufmann had standing to appeal the district court's initial award of attorneys' fees to the Ninth Circuit, as well as standing to participate in the subsequent district court fee determination proceeding commenced after remand from the Ninth Circuit.

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INTRODUCTION

This petition involves an attempt by two class action law firms to nullify a court-ordered $1.825 million reduction in their attorneys' fee award. The Court of Appeals vacated an initial $2.975 million fee award and remanded the attorneys' fee issue back to the district court for further findings. As a result of the remand, the district court reduced the fee award to $1.15 million.

In order to justify their Petition for a Writ of Certiorari ("Petition"), petitioners (or "class counsel") allege that the issues they have raised "turn upon" an intra-Circuit split of authority regarding standing requirements under Article III, Section 2, of the United States Constitution, and an inter-Circuit conflict within the Ninth Circuit. However, as this opposition will make clear, no such conflicts exist.

In analyzing the instant petition, it is important for this Court to recognize that the sole factual premise upon which this petition is based is a red herring. Plaintiff class member and objector Walter Kaufmann has been a class member at *all* times during this litigation. The class, as defined by class counsel and certified by the district court, consists of "all persons and entities who purchased common stock of Occidental Petroleum Corporation at any time between December 1, 1989, and November 30, 1991."[1] That Mr. Kaufmann sold his Occidental shares at any particular point in time during the pendency of this

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[1] It is telling that nowhere in their petition is the definition of the class of which Mr. Kaufmann is a member ever mentioned.

case is absolutely irrelevant to the issue of his class membership (class counsel's assertion that "Walter Kaufmann may *at one point* have been a class member" (Petition at 5) notwithstanding).

Since petitioners are unwilling to place this case in its proper context, respondent is obligated to do so. The issue which petitioners present to this Court is whether Walter Kaufmann, an unnamed class member/objector in a class action, may appeal the amount of his counsel's fee award, even if any fee reduction would not inure to his financial benefit. This situation was created because class counsel arranged a settlement which provided no financial recovery to the class but provided a payment by defendants of an attorneys' fee to class counsel.

The only other Circuit to consider this circumstance, the Third Circuit in the *In re General Motors Corp. Pick-Up Truck Fuel Tank Litig.* (hereinafter *GM Pick-Up)*, 55 F.3d 768 (3d Cir. 1995), ruled that a class member under such circumstances has standing to pursue an appeal of class counsel's fee award:

> Class counsel's argument that objectors have no standing to contest the fee arrangement is patently meritless; the fee arrangement clearly does impact their interests as it is, for practical purposes, a constructive common fund (at 820).

There is no conflict on this issue.

In the instant case, the Ninth Circuit also determined that a class member under such circumstances would have standing to appeal the fee award. However, on the facts specific to this case, the Ninth Circuit ruled that it did not need to resolve the issue of class member

Kaufmann's standing in order to dispose of petitioners' appeal.

STATEMENT OF THE CASE

Because petitioners' Statement of the Case includes numerous misstatements of fact, respondent offers the following corrected Statement of Facts:

1. The litigation underlying this lawsuit was *not* filed on behalf of shareholders of Occidental Petroleum Company. (Petition at 4). It was filed on behalf of "all persons and entities who purchased common stock in Occidental Petroleum Company between December 1, 1989 and November 30, 1991." (Petition, Ninth Circuit Opinion ("Opinion"), Appendix at 2).

2. Walter Kaufmann is *not* a putative (Petition at 4) class member. Kaufmann's purchase of Occidental Petroleum stock during the class period has *never* been questioned.

3. The settlement did not merely "provide for the payment of attorneys' fees and expenses to counsel." (Petition at 4). The settlement provided for defendants' agreement to pay the specific sum of $2,975,000 for attorneys' fees and reimbursement of expenses.

4. The assertion that the issue of the trial court's failure to make proper findings was not even before the court of appeals (Petition at 5) is untrue. Objector raised this issue in his initial appeal, to wit:

1. Whether the trial court, in awarding attorneys' fees of $2.975 million failed to follow Ninth Circuit legal standards:

a) to provide a clear and concise explanation of how it determined $2.975 million was a reasonable fee. (Appellant and Plaintiff Class Member/Objector Walter Kaufmann's Opening Brief, Statement of Issues, Appeal No. 93-56714).

5. The assertion that, during discovery on February 19 and 25, 1997, petitioners learned for the *first* time (Petition at 5) that Walter Kaufmann "may have, at one point" been a member of the subject class, is untrue in two distinct ways. In March of 1993, when Kaufmann filed his objection, petitioners were informed of Kaufmann's class membership.

Secondly, the facts *first* learned by petitioners in 1993 and again in 1997 did not show that Walter Kaufmann *"at one point" "may"* have been a class member. Rather, those facts demonstrated that *at all times* Walter Kaufmann was and continues to be a class member because the class defined by class counsel consisted of "all persons who, during the period December 1, 1989 through November 30, 1991 purchased shares of Occidental Petroleum stock." The sale by Walter Kaufmann of his Occidental shares prior to 1995 did not *in any way* affect Kaufmann's status as a class member.

6. The statement "It became painfully obvious that absent an ownership interest in the stock at issue, Walter Kaufmann lacked any recognizable form of economic or noneconomic interest in the settlement" (Petition at 5, 6) is untrue, as is the statement "Walter Kaufmann failed to

allege or prove the existence of any economic or non-economic injury or any recognizable personal benefit" (Petition at 7, 8). A continuing ownership interest in Occidental stock was never a requirement for class membership. Class membership was defined under Federal Rules of Civil Procedure, Rule 23 by the purchase of Occidental stock during the class period. In fact, the letter accompanying the notice of settlement to class members stated: "Dear current and *former* Occidental common shareholders."

7. The assertions, "moreover he admitted that he expected to obtain no benefit from the results of his objection" (Petition at 6), and "Kaufmann tacitly admitted he had no stake in the outcome of the litigation" (Petition at 6, n.2) are exaggerations. Kaufmann stated "I'm not sure whether I have any personal damages or not. . . . If I do have damages, they'd be relatively small. . . . " (Petition, Kaufmann Deposition, Appendix at 138-39).

8. The district court did not "summarily" (Petition at 7) reduce class counsel's fee. Rather, the court, in an extensive 15-page opinion, explained why it had reduced the fee. (*See* Petition, Order Awarding Attorneys' Fees ("Order"), Appendix at 78-89).

9. The statements that the Ninth Circuit "ignored" the issue of the district court's failure to rule explicitly on Kaufmann's standing and "ignored" subsequently obtained evidence sufficient to override "law of the case" considerations (Petition at 8, n.5) are untrue. As will be shown below, the Ninth Circuit did not ignore either of these issues.

REASONS FOR DENYING THE WRIT

I.

There Is No Conflict Among The Circuits Regarding The Legal Issue Raised In The Petition

In an attempt to obtain review, petitioners assert that the instant decision creates an "intra-Circuit and inter-Circuit split of authority." (Petition at i). The argument advanced is that because class member Kaufmann will receive no financial gain as a result of the lowering of class counsel's attorneys' fee award, he had no standing to appeal the district court's overruling of his objection to the fee provision of the settlement, and no standing to participate in the remanded hearing on the fee award.

It is true that Kaufmann's recovery under the settlement will not be increased as a result of a reduction in class counsel's fee. However, that is because class counsel structured the settlement so that any reduction in their fee request would benefit the defendant and not class members. Petitioners' argument seems to be that Kaufmann, in selling his Occidental shares, cannot claim even an indirect injury from an excessive fee award as a result of a decrease in Occidental's corporate treasury.

This issue is a red herring because the very case cited by petitioners, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), discusses the injury which confers standing as being a "direct injury" (at 477). So, even if Kaufmann continued to own his Occidental shares, he still would not have standing because the injury which he would claim with regard to Occidental's corporate treasury is

indirect. The implication that continued stock ownership would provide class member Kaufmann with an "actual or threatened injury" sufficient to confer standing (Petition at 28-29) is simply incorrect.

This purported lack of standing of a plaintiff class member/objector, as it relates to appeals of attorneys' fee awards in class actions, was directly addressed by the Third Circuit in *In re General Motors Pick-Up Truck Fuel Tank Product Liab. Litig., supra. GM Pick-Up* was a class action in which class members received no pecuniary recovery under the settlement agreement, while class counsel negotiated a fee for themselves. When class members appealed the trial court's approval of the fee awarded to class counsel, class counsel sought to have the appeal dismissed on standing grounds. Class counsel's argument (identical to the argument of class counsel in this case) was that, since a reduction in the fee award would not benefit the class member/objector appellants but would only benefit General Motors by reducing its payment to class counsel, the class member/objectors lacked standing to appeal the district court's attorneys' fee award. The Third Circuit, citing agency principles (similar to agency principles cited in the instant Ninth Circuit opinion) dismissed class counsel's standing argument out of hand.

> [The] purpose of judicial review is to police abuses, even when defendant pays plaintiffs' fees. In the light of these realities, class counsel's argument that objectors have no standing to contest the fee arrangement is patently meritless; the fee arrangement clearly does impact their interest as it is, for practical purposes, a

> constructive common fund. (*GM Pick-Up, supra,* at 820).

Petitioners also assert that the instant ruling is in conflict with an earlier Ninth Circuit decision, *In re First Capital Holdings Financial Prod. Sec. Litig.* (hereinafter *First Capital*), 33 F.3d 29 (9th Cir. 1994). However, no such conflict exists, and, if it did, it would have been a basis for *en banc* review by the Ninth Circuit, which was not sought and would have been denied.

The court in *First Capital* specifically declined to rule on the question of whether an unnamed class member in a class action has standing to appeal a district court's attorneys' fee award over the objection of a class member. Under the circumstance where the fee is separately negotiated, a successful class member/objector appellant would not financially benefit from a fee reduction. Usually, this circumstance occurs in class action settlements in which class members receive no financial benefit. Class counsel negotiate a payment of their attorneys' fee from the defendants, rather than receiving their fee from the class's settlement fund, because there is no settlement fund. The court in *First Capital* specifically declined to rule on the standing of a class member in such a circumstance.

> The fact that the attorneys' fee was separately negotiated and funded has nothing to do with the outcome of this appeal. It is Wolford's particular lack of injury that is unique. . . . *We do not decide the question of whether another class member could attack the fee award, even though it was separately negotiated and funded.* That question is not before us. (*First Capital, supra,* at 30, n.1; emphasis added).

II.

The Petition Simply Fails To Address The Ninth Circuit Decision Regarding:

(a) The Lack of Necessity of a Separate Jurisdictional Standing Determination As Regards Class Member/Objector Kaufmann; and

(b) The Reasons Why Class Member/Objector Kaufmann Would Have Standing Had Such A Determination Been Necessary

It is most telling that rather than address the Ninth Circuit's decision on its merits, petitioners denigrate the Panel's analysis. They label the Ninth Circuit decision "partisan and result oriented," and deprecate the Panel for employing "cryptic" principles of agency law (Petition at 7) and for being "undeterred by mere facts and evidence" (Petition at 6).

In reality, the Ninth Circuit's reasoning is sound and well-grounded in law. The court ruled that on the facts and related law, both the Ninth Circuit, in its initial remand, and the district court, in its remanded fee hearing, possessed jurisdiction over the issue of the amount of class counsel's attorneys' fee. The court therefore held that it was not necessary to reach the issue of whether class member Kaufmann had standing. "Because the district court had to make this determination to approve an attorneys' fee request of class counsel, regardless of whether Kaufmann had standing, we need not decide whether he did in order to resolve petitioners' appeal." (Petition, Opinion, Appendix at 13-14).

The court began by noting that, had it been necessary to resolve the issue, objector Kaufmann had standing

because he was an "economically interested" class member (Petition, Opinion, Appendix at 10) or, in the words of *United States v. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980), he had the "requisite personal interest" in the amount of the fee received by his counsel under the legal principles of:

> (1) principal-agent – "for an agent to accept money from a third party without the principal's consent in the matter for which the agent is employed may be a breach of the agent's fiduciary duty to the principal. . . . " (Petition, Opinion, Appendix at 8);
>
> (2) the attorney-client relationship – "a lawyer shall not accept compensation for representing a client from one other than the client unless . . . the client consents. . . . " (Petition, Opinion, Appendix at 9); and
>
> (3) the fiduciary responsibilities of class counsel to class members in a class action – "because of the attorneys' fiduciary responsibility to the class, of which Kaufmann was an economically interested member. . . . " (Petition, Opinion, Appendix at 10).

The Ninth Circuit went on to discuss why it was not required to reach the question of class member Kaufmann's standing.

With regard to the initial October 1995 Ninth Circuit opinion, the court held that it need not decide whether Kaufmann had standing because the Ninth Circuit decision and order vacating the initial district court fee award had become the law of the case.

With regard to Kaufmann's participation at the remanded proceedings on the attorneys' fee issue in the district court, the Ninth Circuit ruled that it was not necessary to decide whether Kaufmann had standing in order to resolve the district court's jurisdiction to reconsider the fee because:

1. The district court was obligated to reconsider the fee since the Ninth Circuit directed it to do so.

> Because of our previous decision vacating the $3 million award, the district court had to decide upon an award and articulate its reasoning to comply with our mandate. (Petition, Opinion, Appendix at 12).

2. Rule 23 class action responsibilities of the district court resulting from petitioners obtaining class action status for their case provided the district court with continuing equitable jurisdiction over any issue remanded to it as part of its inherent supervisory authority.

> In a class action, where the attorneys' fees come from a common fund or are otherwise paid, the district court must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper. (Petition, Opinion, Appendix at 12).

Therefore, the objector's standing was not necessary to provide jurisdiction to the district court to reconsider the fee award. The duty existed independent of the presence of an objector. The cases cited by petitioners which require an initial party to have standing were satisfied by the allegations of the originally named plaintiffs.

3. A separate Article III case or controversy standing inquiry was unnecessary since the court's fee determination was ancillary to its approval of the settlement. The awarding of a reasonable attorneys' fee was a part of the same equitable jurisdiction with which the court approved the settlement (indeed, the $2.95 million payment to class counsel as attorneys' fees was an actual term of the settlement agreement). The jurisdiction to rule on the settlement did not rest on the objecting class member's standing (i.e., a financial interest or other interest resulting from a fee reduction was unnecessary to provide the court with jurisdiction to rule on the fee award. *See Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975), cited at Petition, Opinion, Appendix at 13).

III.

There Is No Justification to Abandon the Ninth Circuit's Application Of The Law Of The Case Doctrine To the Facts Of The Instant Case

In order to reinstate the initial $2.95 million fee award, petitioners claim that the Ninth Circuit improperly applied the law of the case doctrine to evidence discovered at Kaufmann's deposition on February 19, 1997. However, in their discussion of the doctrine, petitioners acknowledge that in order to override the Ninth Circuit's application of the law of the case doctrine, this Court must find that the Ninth Circuit decision "would work a manifest injustice." (Petition at 8, n.5). Just the opposite is true; the granting of this petition would create an injustice. Class counsel are seeking to reinstate a fee

award, which the district court, after reflection and *detailed* analysis (Petition, Order, Appendix 78-89), found excessive and reduced. Petitioners cannot seriously argue that the reinstatement of the initial attorneys' fee award would remedy a "manifest injustice."

Equally important, class counsel have offered absolutely no argument that the redetermined $1.15 million fee was improperly calculated or unreasonable. The only mention they make in their entire petition is to incorrectly characterize the district court as having "summarily" reduced the fee award. (Petition at 7).

Petitioners have utterly failed to present any evidence as to why an award of $1.15 million in attorneys' fees would constitute a "manifest injustice" to class counsel. Indeed, one could justly argue that the court's awarding of $1.15 million was overly generous in light of the questionable benefits which the district court and the Ninth Circuit found resulted from class counsel's settlement of the lawsuit. (Petition, Order, Appendix at 81-82).

CONCLUSION

The respondent respectfully requests that this Court deny the Petition for Writ of Certiorari for the reasons stated above.

Dated: March 13, 2000

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Supreme Court, U.S.
FILED
MAR 23 2000
CLERK

No. 99-1181

In the

Supreme Court of the United States

ALBERT ZUCKER, SARAH MANDELBAUM, WEISS & YOURMAN and STULL, STULL & BRODY,

Petitioners,

v.

OCCIDENTAL PETROLEUM CORP., RAY IRANI, HOWARD COLLINS, WALTER KAUFMANN and LAWRENCE W. SCHONRBUN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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6 pp

INTRODUCTION

A review of Respondent's brief reveals that the arguments against granting the Writ of Certiorari fall into three distinct categories: 1) a slanted "recitation" of the record in the underlying case, 2) a crabbed analysis of the holdings in the cases of *In re First Capital Holdings Financial Prod. Sec. Litigation*, 33 F. 3d 29 (9th Cir. 1994) and *Valley Force Christian College v. American United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) and 3) an appeal that both trial and appellate courts should have unfettered and unlimited rights to review and modify attorney fee awards regardless of issues of standing, mootness or any other Constitutional restraint.

Since this Court is more than competent to review the record and is unquestionably adept at interpreting case law, Petitioners do not feel the need to repeat their prior analysis of underlying record or the proper interpretation of the above-referenced case law. Nevertheless, a degree of analysis is required relative to the Respondent's third contention relating to the right of judicial review of attorney fee awards.

COURTS DO NOT HAVE AN UNLIMITED RIGHT TO REVIEW AN AWARD OF ATTORNEY FEES

Although suffused throughout the Opposition, Respondent gets to the heart of his argument when he states that a "case or controversy standing inquiry was unnecessary since the court's fee determination was ancillary to its approval of the settlement.". (Opposition at 12). Under Respondent's formulation, a Court could *always* move back and review any award of attorney fees at *any stage of a proceeding* simply through the invocation of "ancillary"

jurisdiction - *regardless* of whether any real controversy remained between the parties. In support of this proposition, Respondent places its reliance upon two cases: *Grunin v. International House of Pancakes,* 513 F.2d 114 (8th Cir. 1975) and *In re General Motors Pick- Up Truck Fuel Tank Litigation,* 55 F.3d 768 (3d Cir. 1995). Neither of these cases are sufficient to support Respondent's weighty axiom.

In the *Grunin* case, at least one party and several attorneys appealed for a review of a trial court's decision regarding *both* a substantive settlement as well as an award of attorney fees at the conclusion of an anti-trust class action. After finding that the substantive settlement was acceptable, the Court turned its attention to the propriety of the various awards of attorneys fees. During this process, the Court dealt with a contention raised at oral argument that one of the attorneys lacked standing to raise the issue of the propriety of the fees charged by another attorney in the underlying case. In dispensing with this issue, the Appellate Court indicated that *since the propriety of the underlying settlement was being questioned, "the reasonableness of the attorneys' fees is within the overall supervisory review of this court." Grunin*, supra, at 127, fn.13. In point of fact, the Court did not completely jettison the notion of the need of standing or even the concept of mootness: instead, it simply indicated that where review by the appellate court was proper as to the propriety of a settlement, it could retain the authority to review the *entire* settlement in order to determine its ultimate fairness to the class.

A review of the record reveals that *Grunin* is simply not applicable to the case at hand. In the instant case, the basis for Kaufmann's appeal was a direct attack upon the propriety of the attorney fees award. Therefore, it is asserted

that when Kaufmann sold his stock, he lost standing as to the entire basis of his appeal.[1]

Respondent's other primary authority, the above-cited *General Motors* decision, is equally unavailing. In two separate sections of its brief, Respondent cites the same language within the case of *In Re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation,* 55 F.3d 768, 820 (3rd Cir. 1995) as support for the proposition that a class member *always* has the right to review an award of attorney fees *regardless* of standing issues. A thorough review of this decision reveals that no such binding "authority" was created by the appellate court's ruling.

As in the *Grunin* case, the appeal of the underlying *General Motors* settlement order was made on the basis of the presence other recognizable issues conferring jurisdiction upon the appellate court. In particular, objectors had raised issues regarding the trial court's failure to formally certify a settlement class, the adequacy of class notice, the trial court's denial of discovery concerning class negotiations and several other factors *along with the issue of the propriety of the attorney fees award. Id.* at 777. In ruling that the underlying settlement was unfair and was based on inadequate findings, the court turned its attention to the issue of attorney fees and commenced its analysis with an acknowledgment that on this issue, its opinion was *mere dicta* because its remand to the trial court was based upon issues relative to class "certification and settlement approval issues". *Id.* at 819.

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[1] To this end, it is significant to note that the Respondent conveniently side-steps the holdings in *Fischer v. CF & I Steel Corp.,* 599 F. Supp. 340 (S.D.N.Y. 1984); *Lewis v. Anderson,* 477 A.2d 1040 (Del. 1984); *Trane Co. v. O'Connor Securities,* 718 F.2d 26 (1983) and, most importantly, *Arizonans for Official English v. Arizona,* 117 S.Ct. 1055 (1997) and *Di Giorgio v. Josephine Lee, et. al.,* 134 F.3d 971 (9th Cir. 1998).

Thereafter, the court restated the bland proposition that within the context of class actions, trial courts should normally review the awards of attorney fees because of the possibility of collusion. *Id.* at 820. In so doing, it merely indicated the parameters of the constructive common fund doctrine: it did *not* obviate the requirement that a party seeking to contest an award of attorneys fees in a class action have standing.

The bulk of authority indicates that standing is a fundamental requirement when there is a direct attack upon the propriety of attorney fees awards. See *Rogers v. Bank of America,* 142 F.2d 128 (9th Cir. 1944))(bank which had sued to quiet title to the land in estate's possession, but had filed no monetary claim against the estate, lacked standing to contest allowance of estate's attorney's fees that would be paid out of the very rents the bank was claiming); *Benitez v. Swanger,* 888 F.2d 930 (1st Cir. 1989)(statutory standing requirement in civil rights litigation as prerequisite to contest attorney fee award); *Dykes v. Dykes*, 10 F.3d 184, 188 (3rd Cir. 1993) (necessity of standing to contest award of attorney fees in bankruptcy proceedings). Also see *Securities & Exchange Commission v. Securities Northern, Inc.*, 573 F.2d 622, 626 (9th Cir. 1978)(appeal of a party to an SEC investigation dismissed since he was "seeking to champion the rights of another" and had an interest which was "indirectly pecuniary...remote and [in]consequential rather than direct and immediate"). Since the decisions in *Grunin* and *General Motors* did not change or alter the requirement that a party seeking to contest an attorney fee award have standing, it is asserted that the Petition should be granted.

CONCLUSION

As indicated in the Petitioners' initial brief, the United States Supreme Court and other tribunals clearly require the presence of an actual case and controversy in order to invoke the power of the federal government. In light of the fact that Respondent has no such real and actual interest in the issue of attorney fees - having freely disbursed his rights through his voluntary sale of Occidental securities - it is submitted that the rulings of the Ninth Circuit on the initial appeal and all orders and appellate opinions emanating from Objector's Kaufmann's actions should be vacated.

DATED: March 23, 2000.

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